6

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 447.

THE STATE OF WISCONSIN UPON THE RELATION OF HARRY W. BOLENS, PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN; ANDREW H. DAHL, STATE TREASURER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED FEBRUARY 5, 1913.

(23,533)

(23,533)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 447.

THE STATE OF WISCONSIN UPON THE RELATION OF HARRY W. BOLENS, PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN; ANDREW H. DAHL, STATE TREASURER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1913.

1

Original.

THE STATE OF WISCONSIN:

In Supreme Court.

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS, Plaintiff,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of Judicature of the State of Wisconsin in rendering judgment against it in the above entitled case, the plaintiff, the State of Wisconsin upon the relation of Harry W. Bolens, hereby prays a writ of error from said decision and judgment to the United States Supreme Court and an order fixing the amount of an undertaking.

Assignment of errors and prayer for reversal herewith.

CARPENTER & POSS,
Attorneys for Plaintiff and Relator.
GEORGE D. VAN DYKE,
JAMES G. FLANDERS,
CHARLES F. FAWSETT,
EDWIN H. ABBOT, JR.,
Of Counsel.

STATE OF WISCONSIN,
Supreme Court, ss:

Let the writ of error issue upon the execution of an undertaking on behalf of the State of Wisconsin on the relation of Harry W. Bolens in the sum of Two hundred & fifty Dollars, such undertaking to be approved by the undersigned.

Dated January 3rd, 1913.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of Wisconsin.

[Seal Supreme Court of Wisconsin.]

2 [Endorsed:] The State of Wisconsin, Supreme Court. The State of Wisconsin upon the Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, Secretary, et al., Defendants. Petition for Writ of Error to the United States Supreme Court and Allowance. Carpenter & Poss, Attorneys at Law, Wells Building, Milwaukee. Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

3

Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Wisconsin upon the relation of Harry W. Bolens, plaintiff and James A. Frear, Secretary of State of the State of Wisconsin, Andrew H. Dahl, State Treasurer of the State of Wisconsin, The Tax Commission of the State of Wisconsin, Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, members of said Tax Commission, defendants wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The State of Wisconsin upon the relation of Harry W. Bolens, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

4 mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the third day of January, in the year of our Lord one thousand nine hundred and thirteen.

[Seal U. S. District Court, Eastern District Wisconsin.]

F. C. WESTFAHL, JR.,
Clerk District Court of the United States
for the Eastern District of Wisconsin.

Allowed, January 3rd 1913.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

[Seal Supreme Court of Wisconsin.]

STATE OF WISCONSIN,
Supreme Court, ss:

The Return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

[Seal Supreme Court of Wisconsin.]

5 [Endorsed:] Original. The State of Wisconsin, Supreme Court. State of Wisconsin: —— County. The State of Wisconsin upon the Relation of Harry W. Bolens Plaintiff, vs. James A. Frear Secretary, et al., Defendants. Writ of Error to the Supreme Court of the United States. Carpenter & Poss, Attorneys at Law, Wells Building, Milwaukee. Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

6

Original.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to James A. Frear, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Wisconsin, wherein The State of Wisconsin upon the relation of Harry W. Bolens is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Wisconsin, this 4th day of January, 1913.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

Attest:

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court of Wisconsin.

MADISON, WISCONSIN, *January* 4, 1913.

I, attorney of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

L. H. BANCROFT,
Attorney for the Defendants in Error.

7 [Endorsed:] Original. The State of Wisconsin, Supreme Court. The State of Wisconsin upon the Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, Secretary, et al., Defendants. Citation. Carpenter & Poss, Attorneys at Law, Wells Building, Milwaukee. Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

8

Copy.

THE STATE OF WISCONSIN:

In Supreme Court.

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS, Plaintiff,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

Know all men by these presents, that the undersigned American Surety Company of New York, is held and firmly bound unto the defendants in error above named, James A. Frear, Secretary of State of the State of Wisconsin, Andrew H. Dahl, State Treasurer of the State of Wisconsin, The Tax Commission of the State of Wisconsin, Nils P. Haugan, Thomas E. Lyons and Thomas S. Adams, members of said Tax Commission, in the sum of Two Hundred Fifty Dollars ($250) to be paid to the said defendants in error, to which payment well and truly to be made the undersigned binds itself, its successors and assigns firmly by these presents.

Sealed with the seal of the undersigned and dated this 3rd day of January, A. D. 1913.

Whereas the above named plaintiff in error, the State of Wisconsin upon the relation of Harry W. Bolens, seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Wisconsin.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error should prosecute its said writ
9 of error to effect and answer all costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

AMERICAN SURETY COMPANY
OF NEW YORK,
By WILLIAM N. LANE, [SEAL.]
Resident Vice President.

Attest:
CAESAR D. MARKS,
Resident Ass't Secretary.

Undertaking approved.
Dated this 3rd day of January, 1913.

[Seal of Wisconsin, Wisconsin Supreme Court.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of Wisconsin.

10

State of Wisconsin,
Department of Insurance.

This is to certify, that the American Surety Company of New York, New York, N. Y., has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this state from the first day of March, 1912, until the twenty-eighth day of February, 1913, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this First day of March, 1912.

[L. S.]

HERMAN L. EKERN,
Commissioner of Insurance.

No. 1.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the American Surety Co. of New York, New York, N. Y., *Company* and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 21 day of December, A. D. 1912.

[L. S.]

HERMAN L. EKERN,
B.,
Commissioner of Insurance.

11 [Endorsed:] Copy. The State of Wisconsin, Supreme Court. The State of Wisconsin upon the Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, Secretary, et al., Defendants. Undertaking. Carpenter & Poss, Attorneys at Law, Wells Building, Wilwaukee. Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

12

Original.

THE STATE OF WISCONSIN:

In Supreme Court.

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS, Plaintiff,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

Assignment of Errors and Prayer for Reversal.

Now comes the above named plaintiff, the State of Wisconsin upon the relation of Harry W. Bolens, and files herewith its petition for a writ of error and says that there are errors in the record and proceedings in the above entitled case and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment.

The Supreme Court of Wisconsin erred in holding and deciding valid or refusing to decide invalid those parts of chapter 658 of the laws of Wisconsin for 1911 designated as Section 1087*m*-3 Subdivision *b*, Section 1087*m*-1, Section 1087*m*-2, Subsection 2, subdivision *a*, Section 1087*m*-2, Subsection 2, subdivisions *b* and *c*, Section 1087*m*-2 Subsection 2 subdivision *d*, Section 1087*m*-2, subsection 2, subdivision *e*, Section 1087*m*-2, subsection 3, Section 1087-3 subdivision *b*, Section 1087*m*-4, subdivision *d*, Section 1087*m*-5, subsection 1, subdivision *a*, *b*, *c*, *d*, and *e*, Section 1087*m*-6 subsection 1, and the whole of said subsection and its subdivisions, Section 1087*m*-6, Section 2, and the whole of said
13 subsection, and all of its subdivisions, Section 1087*m*-7, Section 1087*m*-10, subsections 2, 3, 4, and 5, Section 1087*m*-10, subsection 6, Section 1087*m*-11, subsection 2, Section 1087*m*-12, subsection 2, *Section* 1087*m*-11, *subsection* 2, *Section* 1087*m*-12, *subsection* 2, Section 1087*m*-11, subsections 4 and 5, Section 1087*m*-12, subsection 3, Section 1087*m*-16, subsection 5, Section 1087*m*-22, Section 1087*m*-5, subsection 1, subdivision *c*, Section 1087*m*-17, subsections 1 & 2, and many other sections, subsections and subdivisions including all of sections 2, 3, 5, 6 and 7, of said chapter 658 of the laws of Wisconsin for 1911.

The validity of said sections, subsections and subdivisions was denied and drawn in question by the said plaintiff, the State of Wisconsin on the relation of Harry W. Bolens, on the ground of their being repugnant to the said Constitution of the United States and the amendments thereto and in contravention thereof.

The said errors are more particularly set forth as follows:
The Supreme Court of Wisconsin erred in the following respects:

I.

The Court erred in that its judgment in violation of the Constitution of the United States, Article 1, Section 10, impairs the obligation of contracts by failing to declare violative of said Article 1, Section 10, those parts of Chapter 658 of the Laws of Wisconsin for 1911, designated as Section 1087*m*-2, subsection 2, Subdivision *b*, Section 1087*m*-3, subdivision *b*, and sections 2, 3, 5, 6 and 7 of said chapter 658.

II.

The Court erred in that its said judgment in violation of the amendments to the Constitution of the United States, Article XIV, section 1, deprives many persons within the jurisdiction of the State of Wisconsin, including the relator and all persons similarly
14 situated of their property without due process of law and denies the equal protection of the laws to many persons within the jurisdiction of said state, including the said relator and all persons similarly situated by failing to declare violative of said Article XIV, Section 1, of said amendments, those parts of Chapter 658 of the Laws of Wisconsin for 1911, designated as Section 1087*m*-1, Section 1087*m*-2, subsection 2, subdivision *a*, Section 1087*m*-2, Subsection 2, subdivision *c*, Section 1087*m*-2 subsection 2 subdivision *d*, Section 1087*m*-2, subsection 2, subdivision *e*, Section 1087*m*-2, subsection 3, Section 1087-3 subdivision *b*, Section 1087*m*-4, subdivision *d*, Section 1087*m*-5, subsection 1, subdivisions *a*, *b*, *c*, *d*, and *e*, Section 1087*m*-6 subsection 1, and the whole of said subsection and its subdivisions, Section 1087*m*-6, subsection 2, and the whole of said subsection, and all of its subdivisions, Section 1087*m*-7, Section 1087*m*-10, subsections 2, 3, 4, and 5, and Section 1087*m*-17 subsections 1 and 2.

III.

The Court erred in that its said judgment in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, deprives many persons within the jurisdiction of said State of Wisconsin of their property without due process of law, by failing to declare violative of said Article XIV, Section 1, of said amendments those parts of Chapter 658 of the Laws of Wisconsin for 1911 designated as Section 1087*m*-10, subsection 6, Section 1087*m*-11, subsection 2, and Section 1087*m*-12, subsection 2.

IV.

The Court erred in that its said judgment in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, deprives many persons within the jurisdiction of
15 the said State of Wisconsin of the equal protection of the laws by failing to declare violative of said Article XIV, Sec-

tion 1, of said amendments that part of Chapter 658 of the Laws of Wisconsin for 1911, designated as Sections 1087*m*-11, subsection 2, and 1087*m*-12, subsection 2.

V.

The Court erred in that its said judgment in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, deprives many persons within the jurisdiction of said State of Wisconsin of their liberty and property without due process of law and denies the equal protection of the laws to many persons within the jurisdiction of said State by failing to declare violative of said Article XIV, Section 1, of said amendments those parts of Chapter 658 of the Laws of Wisconsin for 1911, designated as Section 1087*m*-11, subsections 4 and 5, and Section 1087*m*-12, subsection 3.

VI.

The Court erred in that its said judgment in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, deprives many persons within the jurisdiction of said State of Wisconsin of their liberty without due process of law, by failing to declare violative of said Article XIV, Section 1, of said amendments that part of Chapter 658 of the Laws of Wisconsin for 1911 designated as Section 1087*m*-16, subsection 5.

VII.

The Court erred in that its said judgment in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, deprives many persons within the jurisdiction of said State of Wisconsin of their property without due process of
16 law and further in that by requiring impossibilities it will subject many persons within the jurisdiction of said State to the penalties of said Chapter provided, without fault of theirs by failing to declare violative of said Article XIV Section 1, of said amendments that part of Chapter 658 of the Laws of Wisconsin for 1911 designated as Section 1087*m*-22.

VIII.

That said Court erred in that its judgment in violation of the Constitution of the United States, Article IV, Section 2, denies to non-residents of said State of Wisconsin the privileges and immunities of the citizens of Wisconsin by failing to declare violative of said Article IV Section 2 those parts of Chapter 658 of the Laws of Wisconsin for 1911 designated as Section 1087*m*-5, subsection 1, subdivision *c*, Section 1087*m*-17, subsections 1 and 2.

IX.

The Court erred in that its said judgment is in violation of many other articles and sections of the Constitution of the United States and the amendments thereto.

For which errors the said plaintiff, the State of Wisconsin on the relation of Harry W. Bolens, prays that said judgment of the Supreme Court of the State of Wisconsin in the above entitled matter, dated January 9, 1912, be reversed and a judgment rendered in favor of said plaintiff and relator and for costs.

CARPENTER & POSS,
Attorneys for said Plaintiff, the State of Wisconsin on the Relation of Harry W. Bolens.
GEORGE D. VAN DYKE,
JAMES G. FLANDERS,
CHARLES F. FAWSETT,
EDWIN H. ABBOT, JR.,
Of Counsel.

17 [Endorsed:] Original. The State of Wisconsin, Supreme Court. The State of Wisconsin upon the Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, Secretary et al., Defendants. In re Writ of Error to the United States Supreme Court. Assignment of Errors and Prayer for Reversal. Carpenter & Poss, Attorneys at Law, Wells Building, Milwaukee. Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

18

Original.

SUPREME COURT,
State of Wisconsin, ss:

I, Clarence Kellogg, clerk of the said court, do hereby certify that there was lodged with me as such clerk on January 4, 1913, in the matter of The State of Wisconsin upon the relation of Harry W. Bolens, Plaintiff, versus James A. Frear, Secretary of State of the State of Wisconsin, Andrew H. Dahl, State Treasurer of the State of Wisconsin, The Tax Commission of the State of Wisconsin, Nils P. Haugen, Thomas E. Lyons and Thomas S. Adams, members of said Tax Commission, Defendants:

1. The original undertaking of which a copy is herein set forth.
2. Seven copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Madison, Wisconsin, this January 4, 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court of Wisconsin.

[Endorsed:] Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

19 Pleas Before the Supreme Court of the State of Wisconsin at a Term Thereof Begun and Held at the Capitol, in Madison, the Seat of Government of said State, on the Second Tuesday, to-wit, the Ninth Day of January, A. D. 1912.

Present:

Hon. John B. Winslow, Chief Justice; Hon. Roujet D. Marshall, Hon. Robert G. Siebecker, Hon. James C. Kerwin, Hon. William H. Timlin, Hon. John Barnes, and Hon. Aad John Vinje, Justices.
Clarence Kellogg, Clerk.

Be it remembered that heretofore on the tenth day of August in the year of Our Lord One Thousand Nine Hundred and eleven came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the said relator, Harry W. Bolens, by his attorneys, and filed in said Court his certain petition for leave to bring suit in the name of the State against James A. Frear, Secretary of State of Wisconsin, et al., in words and figures following, that is to say:

20 STATE OF WISCONSIN,
In Supreme Court:

Petition.

In the Matter of the Application of Harry W. Bolens, to the Honorable Levi H. Bancroft, Attorney General of the State of Wisconsin, to move in the Supreme Court of said state for leave to bring an action in the name of said state against James A. Frear, Secretary of State of the State of Wisconsin, Andrew H. Dahl, State Treasurer of the State of Wisconsin, the Tax Commission of the State of Wisconsin, Nils Haugen, Thomas D. Lyons, and Thomas S. Adams, members of said Tax Commission, to enjoin them and each of them from taking action under Chapter 658 of the Laws of Wisconsin for 1911, passed at the General Session of the Legislature of Wisconsin, in 1911, which said Chapter is entitled, "An Act to create sections 1087*m*-1 to 1087*m*-30, inclusive, and amend section 1036; subsection 10 of section 1038; subsection 11 of section 1038; subdivision (*a*) of subsection 11*a*, of section 1038; subdivision (*b*) of subsection 11*a*, of section 1038; and repeal subsection 10*a* of section 1038 of the statutes, relating to taxation of incomes, and making an appropriation therefor," on the ground of the unconstitutionality of said Chapter.

To the Honorable Levi H. Bancroft, Attorney General of the State of Wisconsin:

Your petitioner, the undersigned, on his own behalf, and on behalf of all persons similarly situated, and on behalf of all taxpayers of the State of Wisconsin, respectfully requests you to move in the Supreme Court of said state at the opening of said Court, on the 12th day of September, 1911, for leave to bring an action

in said Court against James A. Frear, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; the Tax Commission of the State of Wisconsin,
21 and Nils P. Haugen, Thomas D. Lyons and Thomas S. Adams, who are members of said Tax Commission, to enjoin the said Secretary of State from auditing the salaries and bills of the assessors of incomes, provided for in said Chapter 658 of the Laws of 1911, and of their deputies and assistants, if any such assessors have been heretofore or are hereafter appointed; to enjoin the said State Treasurer from paying any of said bills or salaries, or any part thereof; and to enjoin the said Tax Commission and the said Haugen, Lyon and Adams, as members thereof, from acting under said Chapter 658, and from selecting or appointing any such assessors, deputies or assistants, and from fixing their salaries; and as the grounds for said request, your petitioner respectfully represents and makes known to you and alleges as follows, to-wit:

That the said James A. Frear is Secretary of State of the State of Wisconsin, duly elected, qualified and acting as such;

That the said Andrew H. Dahl is State Treasurer of the State of Wisconsin, duly elected, qualified and acting as such;

That the said Haugen, Lyon and Adams are the members of said Tax Commission.

That your petitioner has annually, for many years past, paid in said city of Port Washington a large amount of money for State, County, City and School Taxes.

That in the month of January, 1911, the legislature of the State of Wisconsin, duly convened in regular session, and did thereafter enact the said Chapter 658 of the Laws of Wisconsin for 1911, entitled

"An Act to create sections 1087*m*-1 to 1087*m*-30, inclusive, and amend section 1036; subsection 10 of section 1038; subsection 11 of section 1038; subdivision (*a*) of subsection 11*a* of section 1038*a*; subdivision (*h*) of subsection 11*a* of section 1038; and repeal subsection 10*a* of section 1038 of the statutes, relating to taxation of incomes, and making an appropriation therefor."

And your petitioner has caused to be prepared a copy of said Chapter 658, which said copy is a true copy of said Chapter, and of the whole thereof, and has caused the same to be hereto annexed, marked Exhibit "A," and makes the same a part of this petition, with the same force and effect as though said copy were herein and
22 here at length set forth; and your petitioner prays that said copy be deemed and taken to be a part of this his petition.

Your petitioner further represents that the said Chapter 658 was approved by the Governor of Wisconsin on the 13th day of July, 1911; that said Secretary of State promptly thereafter filed the same in the archives of his department as a valid law, and that said Secretary of State, on the 15th day of July, 1911, caused the same to be published in the Wisconsin State Journal, the official state paper of the State of Wisconsin; and that the said James A. Frear, Secretary of State, and the said Andrew H. Dahl, State Treasurer, and the said Haugen, Lyons and Adams, members of said

Tax Commission, as your petitioner is informed and believes, have recognized and still do recognize, said Chapter 658 as a valid and constitutional enactment, empowering them and binding upon them and each of them.

And your petitioner further alleges, on information and belief, that the aforesaid Haugen, Lyons and Adams have threatened and do threaten that acting as said Tax Commission they will select and appoint board of review for one or more counties, and assessors of income for one or more assessment districts in the State of Wisconsin, and will authorize such assessors to appoint such deputies and other assistants as may be required for the performance of their alleged duties, and that said Haugen, Lyons and Adams, acting as said Tax Commission, have selected and appointed, or soon will select and appoint such boards of review for one or more counties and such assessors of income for one or more assessment districts in the State of Wisconsin, and have authorized or soon will authorize such assessors to appoint such deputies and their assistants; and that said Haugen, Lyons and Adams have threatened and do threaten that, acting as such Tax Commission, they will fix the salaries and compensation of the members of said boards and of said assessors, deputies and assistants, and that said Haugen, Lyons and Adams, acting as said Tax Commission, in fact have fixed or soon will fix the salaries and compensation of the members of said boards and of such assessors and their deputies and assistants; that said
23 Tax Commission is about to appoint one Kossuth Kent Kennan of Milwaukee, Wisconsin, to some position in which he will be known as Chief of the Income Tax Bureau of the Wisconsin Tax Commission, and is about to fix his salary at approximately four thousand dollars per annum, and that the said Kennan will accept said position, and will begin work promptly after such appointment in the preparation of blank forms for making assessments and reports in accordance with said Chapter, and in the preparation of rules and regulations for the guidance of such assessors, and in other work in connection with such position; and that said acts will be performed by them unless they be restrained by an injunction issued out of the Supreme Court from performing such acts; and that unless so restrained by such injunction, the said James A. Frear, Secretary of State, will audit the bills, salaries and compensation of the members of said boards and of said assessors, deputies and assistants, and of said Kennan, and that unless so enjoined, said Andrew H. Dahl, State Treasurer as aforesaid, will pay said bills, salaries and compensation; and your petitioner alleges, on information and belief, that said Secretary of State is about to audit certain bills and salaries in connection therewith, and that the other steps heretofore recited will shortly be taken; and that said Tax Commission and said assessors of income will on or shortly after the first day of January next proceed to assess as in said Chapter 658 provided, every income received during the preceding calendar year alleged to be liable to taxation under the provisions of said Chapter, and that they will proceed to enforce the collection of said alleged taxes in the manner in said Chapter and otherwise provided, to the oppression of the

people of said state, including your petitioner, and all persons similarly situated; and that by the aforesaid acts, great and needless expense will be entailed upon the taxpayers of said state, including your petitioner, and all persons similarly situated, for the payment of the salaries, expenses and compensation of said Kennan and of the members of said boards and of said income tax assessors, their deputies and assistants, and the expenses of said Tax Commission in that regard, and that a multiplicity of suits will ensue; whereby your petitioner and all persons similarly situated, and all taxpayers of said state will suffer irreparable injury, and that they have no adequate remedy at law, nor has any of them any adequate remedy at law, or any remedy whatever, without the interposition of the Supreme Court of the State.

That, as your petitioner is informed and believes, said Chapter 58 of the Laws of Wisconsin for 1911 is wholly null, void and of no effect for the following among other reasons, to-wit:

That the whole of said Chapter and particularly Section 1087*m*-1, being a part of said Chapter, are in violation of Article 1, Section 1, of the Constitution of Wisconsin, in that they impose a retrospective tax upon a source of taxation never heretofore taxed in Wisconsin, and thereby deprives many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, of certain inherent rights; that said section is further in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*a*), being a part of said Chapter, is in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*c*), being a part of said Chapter, is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wis-

consin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further is in violation of Article VIII, Section 1 of the Constitution, in that it violates as to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*d*), being a part of said Chapter, is in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated; and further in violation of Article VIII, Section 1, of the Constitution in that it violates as to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*e*), being a part of said Chapter, is in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state, including your
26 said petitioner, and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-2, subdivision 3, being a part of said Chapter, is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said State, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-3, subdivision (*b*), being a part of said Chapter, is in violation of Article I, Section 10, of the Constitution of the United States in that it impairs the obligation of contracts, and is also in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within and without the jurisdiction of said State of Wis-

consin of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated: and also is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-3, subdivision (*b*) and 1087*m*-4, subdivision (*d*), being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and deny the equal protection of the laws to many persons within
27 the jurisdiction of said state, including your said petitioner, and all persons similarly situated; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-5, subsection 1, subdivision (*a*), (*b*), (*c*), (*d*), and (*e*), being a part of said Chapter are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-5, subdivision (*e*), and Section 1087*m*-6, subsection 1, and the whole of said subsection and its subdivisions, being a part of said Chapter, are in violation of the Amendments to the constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property, without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-6, subsection 2, and the whole of said subsection and all the subdivisions thereof, being a part of said Chapter, are in violation of the Amendments to the Constitution of the

United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of
28 their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-7, being a part of said Chapter, is in violation of Article I, Section 1, of the Constitution of Wisconsin, in that it imposes conditionally a doubly retrospective tax upon a source of taxation never heretofore taxed in Wisconsin, and thereby deprives many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, of certain rights; and further is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that it violates as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform; and further is in violation of Article IV, Section 1, of the Constitution of Wisconsin, in that it delegates legislative functions to the Courts.

That Section 1087*m*-8, subsection 2, being a part of said Chapter, and Section 1087*m*-14, being a part of said Chapter, are in violation of Article XIII, Section 9 of the Constitution of the State of Wisconsin, in that they provide for the appointment of assessors of incomes for each assessment district, and a County Boards of Review, so-called, by the said Tax Commission.

That Section 1087*m*-8, subsection 5, being a part of said
29 Chapter, is in violation of Article XIII, Section 9, of the Constitution of Wisconsin, in that it authorizes the said Tax Commission to authorize any assessor of incomes to appoint such deputies and other assistants as may be required for the proper performance of his alleged duties, and in that it fails to require from such other assistants any constitutional oath.

That Section 1087*m*-9, and Section 1087*m*-14, both being a part of said Chapter, are in violation of Article IV, Section 1, of the Constitution of Wisconsin, in that they contain an unlawful delegation of legislative power to the Tax Commission, namely, the power to fix the salaries of such assessors, deputies and assistants, and members of the County Boards of Review, and further are in violation of Article IV, Section 26, of the Constitution of Wisconsin, in that it permits the said Tax Commission to increase or diminish the

salaries of said assessors, deputies and assistants, during their term of office, and in that it makes such a limitation upon such salaries that in case of a decrease in the assessment of any assessment district, the said Tax Commission might be bound so to reduce such salaries, or the same might be automatically reduced.

That Section 1087*m*-10, subsection 2, 3, 4, and 5, being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, including your said petitioner, and all persons similarly situated, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, including your said petitioner, and all persons similarly situated, and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, including your said petitioner and all persons similarly situated, the rule that taxation shall be uniform.

That Section 1087*m*-10, subsection 6, being a part of said Chapter, is in violation of Article IV, Section 26, of the Constitution of Wisconsin, in that it authorizes the diminishing of the salaries of said assessors and deputy assessors during their terms of office, and is also in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives the said
30 assessors and deputy assessors of their property without due process of law, and is also in violation of Article VII, section 2 of the Constitution of Wisconsin, in that it vests said Tax Commission with judicial powers; and is also in violation of Article 1, Sections 5 and 7 of the Constitution of Wisconsin, in that it deprives said assessors and deputy assessors of the right to be heard by counsel and of the right to a trial by jury.

That Section 1087*m*-11, subsection 2, and Section 1087*m*-12, subsection 2, both being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state; and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that they violate as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform, and are also in violation of Article VII, Section 2, of the Constitution of Wisconsin, in that they vest judicial powers in said Tax Commission, and are also in violation of Article 1, Sections 5 and 7 of the Constitution of Wisconsin, in that they deprive all persons therein mentioned of the right to be heard by counsel and of the right to a trial by jury.

That Section 1087*m*-11, subsections 4 and 5, and Section 1087*m*-12, subsection 3, being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin of their liberty and prop-

erty without due process of law, and in that they deny the equa
protection of the laws to many persons within the jurisdiction o
said state, and are further in violation of Article I, Section 1, of th
Constitution of Wisconsin, in that they deprive many persons withi
the jurisdiction of said state of certain inherent rights.

That Section 1087*m*-16, subsection 5, being a part of said Chapter,
is in violation of the Amendments to the Constitution of the United
States, Article XIV, Section 1, in that it deprives many per-
31 sons within the jurisdiction of said state of their liberty with-
out due process of law, and further is in violation of Article
I, Section 1, of the Constitution of Wisconsin in that it deprives
many persons within the jurisdiction of said state of certain inherent
rights, and further is in violation of Article VII, Section 2, of the
Constitution of Wisconsin.

That Section 1087*m*-18, being a part of said Chapter, is in viola-
tion of Article I, Section 9, of the Constitution of Wisconsin, in
that it deprives many persons within the jurisdiction of said state
of all certain remedy in the laws for injuries or wrongs which they
may receive in their property and denies to them the right to ob-
tain justice freely and without being obliged to purchase it, com-
pletely and without denial, promptly and without delay, con-
formably to the laws.

That Section 1087*m*-22, and the whole thereof, being a part of
said Chapter, is in violation of the Amendments to the Constitution
of the United States, Article XIV, Section 1, in that it deprives
many persons within the jurisdiction of said state — cess of law,
and further in that by requiring impossibilities, it will subject many
persons within the jurisdiction of said state, including your peti-
tioner, and all other persons within the jurisdiction of said state,
including your petitioner, and all persons similarly situated, to the
penalties in said Chapter provided, without fault of theirs.

That the aforesaid and many other sections, subsections and sub-
divisions of said Chapter violate the aforesaid and many other
articles and sections of the Constitution of the United States and
the Amendments thereto, and the Constitution of Wisconsin and the
Amendments thereto.

Wherefore, because of the allegations herein and of the wrongs
herein complained of, and to protect himself and all other persons
similarly situated, and to protect all the taxpayers of the State of
Wisconsin against the threatened invasion of their rights and
liberties as aforesaid, and for as much as all said persons are reme-
diless in the premises without the interposition of the Supreme Court
of this state, your petitioner prays the Honorable, the Attorney Gen-
eral of said state, to move in the Supreme Court thereof at the open-
ing of said Court, on the 12th day of September, 1911, for leave
to bring an action in said Court against said James A. Frear,
32 Secretary of State of the State of Wisconsin, to enjoin him
from auditing the bills, salaries and compensation of the said
Income Tax Assessors, deputies and assistants, and County Boards of
Review, and of the said Kossuth Kent Kenman, or any part thereof;
and against the said Andrew H. Dahl, State Treasurer of the State of

Wisconsin, to enjoin him from paying such bills, salaries and compensation or any part thereof; and against the Tax Commission of the State of Wisconsin, and its members, the said Nils P. Haugen, Thomas D. Lyons and Thomas S. Adams, to enjoin it and them from so appointing the said Kennan and from selecting or appointing such Income Tax Assessors or County Boards of Review, and from fixing their salaries or compensation; and further to enjoin the aforesaid parties and each of them from taking any steps whatsoever in pursuance of said Chapter 658 of the Laws of the State of Wisconsin for 1911, and for such other and further order, decree, judgment or relief as to the said Court shall seem just and equitable, needful and right in the premises, so as fully to protect and secure the said rights and privileges guaranteed to the people of this State by the Constitution of the United States and the Amendments thereto, and the Constitution of the State of Wisconsin, and the Amendments thereto.

And your petitioner will ever pray.

HARRY W. BOLENS, *Petitioner.*

STATE OF WISCONSIN,
Milwaukee County, ss:

Harry W. Bolens, being first duly sworn, deposes and says that he has read the above and foregoing petition by him subscribed, and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HARRY W. BOLENS.

Subscribed and sworn to before me this 8th day of August, A. D. 1911.

BENJ. POSS,
Notary Public, Milwaukee County, Wisconsin.

33

EXHIBIT A.

Wisconsin Income Tax Law.

[No. 573 S.]

[Published July 15, 1911.]

Chap. 658, Laws of 1911.

An act to create sections 1087*m*-1 to 1087*m*-30, inclusive, and amend section 1036; subsection 10, of section 1038; subsection 11, of section 1038; Subdivision (*a*), of subsection 11*a*, of section 1038*a*; subdivision (*b*), of subsection 11*a*, of section 1038; and repeal subsection 10*a*, of section 1038 of the statutes, relating to taxation of incomes, and making an appropriation therefor.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. There are added to the statutes thirty new sections to read: Section 1087*m*-1. There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such persons and from such sources as hereinafter described; provided, that firms, co-partnerships, corporations, joint stock companies and associations which customarily close their annual accounts on a date other than December 31, or which customarily estimate their income or profits on a basis other than of actual cash receipts and disbursements, may, with the consent and approval of the tax commission, return for assessment and taxation the income or profits earned during the business year for which the accounts of such person are customarily made up.

SECTION 1087*m*-2. 1. The term "person," as used in this act, shall mean and include any individual, firm, co-partnership, and every corporation, joint stock company or association organized for profit, and having a capital stock represented by shares, unless otherwise expressly stated.

2. The term "income," as used in this act, shall include:

(*a*) All rent of real estate, including the estimated rental of residence property occupied by the owner thereof.

(*b*) All interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever.

(*c*) All wages, salaries or fees derived from services; provided that compensation to public officers for public service shall not be computed as a part of the taxable income in such cases where the taxation thereof would be repugnant to the constitution.

(*d*) All dividends or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous or from any business whatever.

(e) All royalties derived from the possession or use of franchises or legalized privileges of any kind.

(f) And all other incomes of any kind derived from any source whatever except such as is hereinafter exempted.

34 3. The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every non-resident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (c) of section 1770*b*, as far as applicable.

SECTION 1087*m*-3. Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions:

(a) Payments made within the year for personal services of officers and employés actually employed in the production of such income; provided, there be reported the name, address and amount paid each such officer or employé to whom compensation of seven hundred dollars or more shall have been paid during the assessment year.

(b) Other ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and property, including a reasonable allowance for depreciation of property from which the income is derived. All bonds issued by a corporation shall be deemed an interest in the property and business of such corporation; and so much of the interest payable on such bonds as is represented by the ratio between the property located and business transacted within this state to the total property and business of such corporation as provided in subdivision 3, of section 1087*m*-2, shall be subject to taxation under this act at the same rate as the income of such corporation. Such tax shall be assessed to the bondholders under the general designation "The Bondholders of —" (inserting the name of the corporation), but shall be a lien upon the property and business of such corporation prior to all other liens, and unless paid by the bondholders shall be enforced against the corporation. When paid by the corporation the amount of such tax may be deducted from the next interest payment on such bonds, unless otherwise provided by contract.

(c) Losses actually sustained within the year and not compensated for by insurance or otherwise.

(d) Sums paid by such persons within the year for taxes imposed by any state of this union or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by this act is derived.

(e) Dividends or income received within the year from stocks or interest in any firm, copartnership or corporation, joint stock company or association, the income of which shall have been assessed under the provisions of this act; provided, such firm, copartnership, corporation, joint stock company, or association report at the time of assessment the name and address of each such person owning stocks or interest in the same and the amount of dividends or income paid such person during the assessment year.

(f) Interest received from bonds or other securities exempt from taxation under the laws of the United States.

35 SECTION 1087*m*-4. Persons other than corporations, joint stock companies or associations, in reporting incomes for purposes of taxation shall be allowed the following deductions:

(a) The ordinary and necessary expenses actually paid within the year in carrying on the profession, occupation or business from which the income is derived, including a reasonable allowance for depreciation of the property from which the income is derived. But no deductions shall be made for any amount paid for personal services unless these be reported, the name, address and the amount paid each such employé to whom a compensation of seven hundred dollars or more shall have been paid during the assessment year.

(b) Losses during the year and not compensated for by insurance or otherwise.

(c) Dividends or incomes received by any person from stocks, or interest in any firm, copartnership, corporation, joint stock company or association, the income of which shall have been assessed under the provisions of this act; provided, said firm, copartnership, corporation, joint stock company or association report at the time of assessment the name and address of each such person owing stock or interest in the same and the amount of dividends or income paid such person during the assessment year.

(d) Interest paid within the year on existing indebtedness; provided, the debtor reports the amount so paid, the form of the indebtedness, together with the name and address of the creditor.

(e) Interest received from bonds or other securities exempt from taxation under the laws of the United States.

(f) Salaries or other compensation received from the United States by officials thereof.

(g) Pensions received from the United States.

(h) Taxes paid by such persons during the year other than inheritance taxes upon the property or business from which the income hereby taxed is derived.

(i) All inheritances, devises and bequests received during the year upon which an inheritance tax shall have been paid to this state.

(j) Insurance to the total amount of ten thousand dollars received by any person or persons legally dependent upon the decedent, in payment of a death claim by any insurance company, fraternal benefit society or other insurer.

SECTION 1087*m*-5. 1. There shall be exempt from taxation under this act income as follows, to-wit:

(*a*) To an individual income up to and including eight hundred dollars;

(*b*) To husband and wife, twelve hundred dollars;

(*c*) For each child under the age of eighteen years, two hundred dollars;

(*d*) For each additional person, for whose support the taxpayer is legally liable and who is entirely dependent upon the taxpayer for his support, two hundred dollars.

(*e*) The aforesaid exemptions shall not apply to incomes derived from sources within the state by non-residents thereof, nor to firms, copartnerships, corporations, joint stock companies nor associations.

In computing said exemptions and the amounts of taxes payable under section 1087*m-7* of this act, the income of a wife shall be added to the income of her husband, and the income of each child under eighteen years of age to that of its parent or parents, when said wife or child if not living separately from said husband, parent or parents.

2. Income of any mutual savings or loan and building association, or of any religious, scientific, educational, benevolent or other association of individuals not organized or conducted for pecuniary profit.

3. Incomes derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes, and such persons shall continue to pay taxes and license fees as heretofore.

4. Income received by the United States, the state and all counties, cities, villages, school districts or other political units of this state.

Sec. tion 1087*m-6*. 1. The tax to be assessed, levied and collected upon the incomes of all persons, except as otherwise provided by law, after making such deductions and exemptions as are hereinbefore allowed, shall be computed at the following rates, to-wit:

(*a*) On the first one thousand dollars of taxable income or any part thereof, at the rate of one per cent;

(*b*) On the second one thousand dollars or any part thereof, one and one-fourth per cent;

(*c*) On the third one thousand dollars or any part thereof, one and one-half per cent;

(*d*) On the fourth one thousand dollars or any part thereof, one and three-fourths per cent;

(*e*) On the fifth one thousand dollars or any part thereof, two per cent;

(*f*) On the sixth one thousand dollars or any part thereof, two and one-half per cent;

(*g*) On the seventh one thousand dollars or any part thereof, three per cent;

(*h*) On the eighth one thousand dollars or any part thereof, three and one-half per cent;

(*i*) On the ninth one thousand dollars or any part thereof, four per cent;

(*j*) On the tenth one thousand dollars or any part thereof; four and one-half per cent;

(*k*) On the eleventh one thousand dollars or any part thereof, five per cent;

(*l*) On the twelfth one thousand dollars or any part thereof, five and one-half per cent;

(*m*) On any sum of taxable income in excess of twelve thousand dollars, six per cent.

2. Providing, however, that the tax to be assessed, levied and collected upon the incomes of corporations, joint stock companies or associations, after making due allowance for deductions as hereinbefore provided, shall be computed at the following rates to-wit:

(*a*) If the taxable income equals one per cent or less of the assessed value of the property used and employed in the acquisition of such income, the rate of tax shall be one-half of one per cent of such income.

37 (*b*) If the taxable income equals more than one, but does not exceed two per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of tax shall be one per cent of such income.

(*c*) If the taxable income equals more than two, but does not exceed three per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be one and one-half per cent of such income.

(*d*) If the taxable income equals more than three, but does not exceed four per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be two per cent of such income.

(*e*) If the taxable income equals more than four, but does not exceed five per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be two and one-half per cent of such income.

(*f*) If the taxable income equals more than five, but does not exceed six per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be three per cent of such income.

(*g*) And in like manner the tax upon the taxable income shall continue to increase at the rate of one-half of one per cent for each additional one per cent or fractional part thereof that the taxable income bears to the assessed value of the property used and employed in the acquisition of such income, until the rate of profits equals twelve per cent of such assessed value of the property used and employed in the acquisition of such income, when such rate shall continue as a proportional rate of six per cent of such taxable income.

SECTION 1087*m*-7. The legislature intends subsection 2, of section 1087*m*-6 of this act, to be a separable part thereof, so that said subsection may fail or be declared invalid without adversely affecting any other part of the act; provided that in event of its failing or being declared invalid the incomes of corporations, joint stock companies and associations shall be subject and shall be construed to have been subject to taxation at the rates specified in subsection 1, of section 1087*m*-6, and said incomes shall be reassessed by the tax

commission and taxed for the years for which the rates provided in subsection 2, of section 1087*m*-6, shall have failed.

SECTION 1087*m*-8. 1. The state shall be divided into assessment districts by the state tax commission, but in no instance shall a county be divided.

2. Not less than thirty days prior to the first of March, 1912, there shall be selected and appointed by the state tax commission an assessor of incomes for each assessment district in the state, who shall hold office for a term of three years unless sooner removed as hereinafter provided. Such assessor shall be a citizen and an elector of this state, but need not be a resident of the district in which he is appointed to serve; provided, however, that so far as practicable, preference shall be given in making such appointments to residents of the districts.

3. The tax commission may in its discretion transfer any assessor of incomes from one district to another and may remove any assessor of incomes or his deputy from office.

4. Before entering upon his duties such assessor of incomes shall subscribe to the constitutional oath and file the same in the office of the secretary of state.

38 5. The state tax commission may authorize any assessor of incomes to appoint such deputies and other assistants as may be required for the proper performance of his duties. Such deputies shall qualify in like manner and possess the same powers as the assessor.

SECTION 1087*m*-9. The salaries of the assessors of incomes and their deputies and assistants shall be fixed by the state tax commission, but such salaries, together with the expenses of such assessors and their deputies and assistants, shall not in any year exceed in amount five cents for every thousand dollars of the valuation of all property as fixed by the tax commission in the state assessment of the preceding year. The assessor shall be furnished all necessary printing, stationery and postage, and he and his deputies shall be entitled to receive their actual necessary expenses while traveling in the performance of their duties. The salaries of the assessor and his assistants, and all such expenditures shall be audited and paid out of the state treasury in the same manner as other similar salaries and state expenses are audited and paid.

SECTION 1087*m*-10. 1. The state tax commission and the assessors of incomes shall annually on the first day of January, or as soon thereafter as practicable, proceed to assess as hereinafter provided every income received during the preceding calendar year liable to taxation under the provisions of this act. The assessment of corporations, joint stock companies and associations shall be made by the state tax commission, and the assessment of persons, other than corporations, joint stock companies and associations shall be by the county assessor of incomes.

2. In the performance of such duty the state tax commission and the county assessors of incomes shall respectively possess all powers now or hereafter granted by law to the state tax commission or as-

sessors in the assessment of personal property and also the power to estimate incomes.

3. Every corporation, joint stock company or association, whether taxable under this act or not, shall furnish to the tax commission a true and accurate statement at such time, in such manner and form and setting forth such facts as said commission shall deem necessary to enforce the provisions of this act. Such statement shall be made upon the oath or affirmation of the president, vice-president or other principal officer and the treasurer of said corporation, joint stock company or association.

4. Whenever in the judgment of the assessor of incomes any person in his district other than a corporation, joint stock company or association shall be subject to an income tax under the provisions of this act, he shall require such person to make report in such manner and form as the tax commission may prescribe, specifying particularly among other items the amount of income received from services, unsecured notes, mortgages, bonds, stocks, real estate and other such information as the commission shall deem necessary to enforce the provisions of this act.

5. Every guardian, trustee, executor, administrator, agent or receiver, and every other person or corporation acting in a fiduciary capacity, shall make and render to the assessor of incomes of the district in which such representative resides, a verified list or return as aforesaid of the amount of income of any such person, ward or beneficiary. The return so made shall be signed by the person rendering it, and by the president or secretary thereof, if a corporation.

6. For each question unanswered the assessor or deputy assessor, failing to present satisfactory cause for such omission to the state tax commission, shall be subject to a penalty of five dollars, and
39 said penalty shall be deducted from all compensation, of said assessor or deputy assessor at the time such compensation is paid.

SECTION 1087*m*-11. 1. Whenever evidence shall be produced before the state tax commission, which in the opinion of the commission, justifies the belief that in any one or more of the three next previous years the returns made by any corporation, joint stock company or association are incorrect, or are made with false or fraudulent intent, or when any corporation, joint stock company or association has failed or refused to make a return as required by law the state tax commission may require from every such corporation, joint stock company or association such further information with reference to its capital, income, losses, expenditures and business transactions as is deemed expedient. Upon the information so required the state tax commission may make such additions or corrections to the assessment as is deemed true and just, such correction to be made in the next tax levy. Whenever the state tax commission shall so increase or make subject to tax any income, it shall give notice in writing to the person liable for the payment of the tax on said income of the amount of the assessment. Such notice may be served by registered mail.

2. In case any return made by any corporation, joint stock com-

pany or association is made with false or fraudulent intent or in case of a refusal or neglect to make a return as required by law, and an additional amount is discovered, the amount so discovered shall be subject to twice the original rate. The amount so added to the tax shall be collected at such time and in such manner as may be designated by the state tax commission.

3. In case of neglect occasioned by the sickness or absence of an officer of any corporation, joint stock company or association required to make said return, or for other sufficient reason, the state tax commission may allow such further time for making and delivering such return as it may deem necessary, not to exceed thirty days.

4. If any of the corporations, joint stock companies or associations aforesaid shall fail or refuse to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association shall be liable to a penalty of not less than one hundred dollars and not to exceed five thousand dollars at the discretion of the court.

5. Any officer of a corporation, joint stock company or association required by law to make, render, sign or verify any return who makes any false or fraudulent return or statement, with intent to defeat or evade the assessment required by this act to be made, shall upon conviction be fined not to exceed five hundred dollars or be imprisoned not to exceed one year, or both, at the discretion of the court, with the cost of prosecution.

SECTION 1087*m*-12. 1. Whenever the assessor of incomes or the county board of review herein provided for shall have reason to believe that in any one or more of the three next previous years the returns made by any person other than a corporation, joint stock company, or association are incorrect or are made with false or fraudulent intent, or when any such person has failed or refused to make a return as required by law, the assessor or county board of review shall make such additions or corrections to the next assessment as he or they shall deem true and just. Whenever the assessor or the county board of review shall so increase or make subject to tax any income he or they shall give notice in writing to the person liable for the payment of the tax on said income of the amount of the assessment. Such notice may be served by registered mail.

2. In case any return made by any person other than a corporation, joint stock company or association is made with false or fraudulent intent, or in case of a refusal or neglect to make a return as required by law, and an additional amount is discovered, the amount so discovered shall be subject to twice the original rate.

3. Any person, other than a corporation, joint stock company or association who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return shall upon conviction be fined not to exceed five hundred dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the cost of prosecution.

SECTION 1087*m*-13. Any corporation, joint stock company or association subject to assessment by the state tax commission, feeling

aggrieved by the decision of said commission regarding the assessment of its income, shall be granted the same rights of hearing and appeal as are now granted corporations assessed by said commission.

SECTION 1087*m*-14. The state tax commission shall appoint three resident tax payers of each county to serve as a county board of review, and shall fix their compensation, which shall not be more than ten dollars per day, and shall be audited and paid in the same manner as the salary of assessors under this act is paid.

SECTION 1087*m*-15. The county clerk shall be clerk of such board, and shall keep an accurate record of all proceedings thereof, including a correct record of all changes in the assessment rolls made by the board. The county clerk shall take full minutes of all evidence given before the board; provided, however, that the board, with the approval of the assessor of incomes, may in cases where they deem it advisable, employ a stenographic reporter to take such evidence in shorthand, and extend the same in typewritten form. The county clerk shall preserve in his office a record of all such proceedings, minutes and evidence taken, and all documentary evidence offered. The stenographer shall be paid by the state, but the board may, in its discretion, charge the expenses to the complaining party or parties appearing before the board.

SECTION 1087*m*-16. 1. The county board of review of each county, constituting an assessment district, shall meet annually on the last Monday of July at ten o'clock a. m. at the court house in said county to hear complaints and to review the assessments of income made by the assessor. A majority shall constitute a quorum.

2. In assessment districts composed of more than one county the board of review of the county designated by the assessor of incomes shall meet as provided above and the board of review of each remaining county of the district shall meet as soon thereafter as is possible for the assessor of incomes to be present. The date of such meeting shall be fixed by the assessor of incomes.

3. Notice of the annual meeting of each county board of review shall be published in a newspaper of the county at least one week previous to such meeting.

4. The board may adjourn from day to day, and from time
41 to time, until its business is completed, but no adjournment other than from day to day shall be had except upon written request and for satisfactory cause shown.

5. Attendance of witnesses and the production of books and papers before said board may be compelled by subpœna, issued by the clerk thereof, a justice of the peace or a court commissioner.

SECTION 1087*m*-17. 1. The board shall hear and examine, and permit the assessor to examine, any aggrieved or other person upon oath who shall appear before it in relation to any assessment or commission of income, and may increase or lessen the amount of any income assessed, if satisfied from the evidence submitted and the statements of the assessor, that such change should be made.

2. The board shall not increase any assessments, nor assess any income not on the roll without notice in writing to the person liable for payment of the tax thereon, or his agent, if either be resident

of the county, of such intention in time to appear and be heard before the board in relation thereto.

SECTION 1087*m*-18. No person subject to assessment by the county assessor shall be allowed in any action or proceeding to question any assessment of income, unless objections thereto shall first have been presented to the county board of review in good faith and full disclosure made under oath of any and all income of such party liable to assessment.

SECTION 1087*m*-19. 1. Any person dissatisfied with any determination of the county board of review may appeal within twenty days to the state tax commission, to whom a copy of the record of the board shall be certified, together with all evidence or a copy thereof, relating to such assessment.

2. The tax commission shall review such assessments from the record thus submitted and shall make necessary corrections and certify its conclusion to the county clerk, who shall duly notify the person liable for the tax and enter upon the assessment roll any change by the commission.

SECTION 1087*m*-20. 1. The state tax commission shall complete the assessment of income for each corporation, joint stock company, and association on or before the fifteenth day of October in each year, and compute the tax thereon, and shall thereupon forthwith certify to each county clerk a statement of the assessment of each corporation, joint stock company and association in his county and the amount of tax levied against each.

2. The state tax commission shall submit in their biennial report the amount of income tax collected for each county in the state, and shall designate the several general classes of property from which the incomes were received, the cost to the state and each county for the administration of the law, and all such facts as shall be required to give a definite understanding of the financial operations of the law.

SECTION 1087*m*-21. The tax upon the income of persons other than corporations, joint stock companies and associates shall be computed by the county clerk, assisted by the assessor of incomes and said clerk shall on or before November first, certify to each town, city and village clerk the names of all persons whose incomes are assessed in his own town, city or village, and the amount of tax levied against each such person, and such amount shall be entered by the town, city and village clerks in a separate column
42 designated "income tax" upon the tax roll of the year, and shall be collected and paid as personal property taxes are now collected and paid.

SECTION 1087*m*-22. The place at which the income tax herein provided for shall be assessed, levied and collected shall be determined as follows:

1. In their return for purposes of assessment persons deriving incomes from within and without the state, or from more than one political subdivision of the state, shall make a separate accounting of the income derived from without the state and from each political

subdivision of the state in such form and manner as the tax commi
sion may prescribe.

2. The entire taxable income of every person deriving incom
from within and without the state or from within different portion
subdivisions of the state, when such person resides within the stat
shall be combined and aggregated for the purpose of determining
the proper exemptions and proper rate of taxation. The taxabl
income so computed shall be assessed, and taxes at such rate shal
be paid, in the several towns, cities and villages in proportion to the
respective amounts of income derived from each, counting that
part of the income derived from without the state when taxable as
having been derived from the town, city or village in which said
person resides.

3. Income derived by non-residents of the state from sources
within the state or within its juri-diction, shall be separately assessed
and taxed in the town, city or village from which such income is
derived, at a rate determined by the total income derived from
within any single town, city or village.

4. All laws not in conflict with the provisions of this act regulating
the time, place and manner of payment of taxes on personal property,
the collection thereof by action, distress or otherwise and the return
of personal property taxes unpaid, shall apply to the income herein
provided for.

SECTION 1087*m*-23. The revenue derived from such income
tax shall be derived as follows, to-wit: Ten per cent to the state,
twenty per cent to the county and seventy per cent to the town,
city or village in which the tax was assessed, levied and collected,
which shall be remitted and accounted for in the same manner as
the state and county taxes collected from property are remitted and
paid.

SECTION 1087*m*-24. 1. No commissioner, assessor of incomes,
deputy member of a county board of review, or any other officer,
agent, clerk or employé shall divulge or make known to any person
in any manner except as provided by law any information whatso-
ever obtained directly or indirectly by him in the discharge of his
duties or permit any income return or copy thereof or any paper
or book so obtained to be seen or examined by any person except
as provided by law.

2. Any officer, agent, clerk or employé violating any of the pro-
visions of this section shall upon conviction thereof be punished
by a fine of not less than one hundred dollars nor more than five
hundred dollars, or by imprisonment in the county jail for not less
than one month nor more than six months, or by imprisonment
in the state prison for not more than two years, at the discretion of
the court.

3. Such officer, agent, clerk or employé upon such conviction
shall also forfeit his office or employment and shall be incapable
of holding any public office in this state for a period of three years
thereafter.

4. Nothing herein shall be construed as preventing the as-
43 sessment roll, the tax roll and all proceedings had before the
county board of review and all evidence taken at such hearing

from being open to public inspection at such times and under such conditions as the state tax commission may direct.

SECTION 1087*m*-25. 1. On and after the first Monday in January, 1912, the office of county supervisor of assessment is hereby abolished.

2. The assessor of incomes shall on and after the first Monday of January, 1912, in addition to the duties and powers herein imposed and conferred upon him, perform all the duties and possess all the powers heretofore imposed and conferred by law upon said county supervisor of assessment. The assessor of incomes shall be under the direction and control of the state tax commission, and shall make such reports to the commission, to the county board of review and the county board of supervisors, and perform such other duties as the commission shall direct.

SECTION 1087*m*-26. Any person who shall have paid a tax upon his personal property during any year shall be permitted to present the receipt therefor to, and have the same accepted by, the tax collector to its full amount in the payment of taxes due upon the income of such person during said year. Any bank which has paid taxes during any year upon its shares assessed to the individual stockholders thereof shall be entitled, under the provisions of this section, to present the receipt therefor, and have the same accepted by the tax collector to its full amount in the payment of taxes due upon the income of such bank during said year.

SECTION 1087*m*-27. Nthing contained in this act shall be construed to affect the assessment or collection of taxes assessed in the year 1911 or prior thereto, under present laws, nor to limit the power of assessors and boards of review relative to correcting assessment rolls, placing omitted property thereon, and reassessing property whenever such corrections, insertion of omitted property, or reassessment might be made under the laws as they now exist.

SECTION 1087*m*-28. The state tax commission is hereby empowered to make such rules and regulations as it shall deem necessary in order to carry out foregoing provisions.

SECTION 1087*m*-29. The state tax commission is hereby authorized to employ such clerks and specialists as are necessary to carry into effective operation this act.

SECTION 1087*m*-30. There is hereby appropriated from the general fund of the state, out of any money in the state treasury not otherwise appropriated, a sum sufficient to carry out the provisions of this act.

SECTION 2. Section 1036 of the statutes is amended to read: Section 1036. The term "personal property," as used in this title, shall be construed to mean and include toll bridges, saw logs, timber and lumber, either upon land or afloat; steamboats, ships and other vessels, whether at home or abroad; buildings upon leased lands, if such buildings have not been included in the assessment of the land on which they are erected; ferry boats, including the franchise for running the same; ice cut and stored for use, sale or shipment; * * * and all goods, wares marchandise, chattels, * * * and effects, of

any nature or description, having any real or marketable value, and not included in the term "real property," as above defined.

44 SECTION 3. Subsection 10, of section 1038 of the statutes is amended to read: 10. All moneys, all * * * debts due or to become due to any person, and all stocks and bonds not otherwise specially provided for. * * * Nothing herein shall be construed to exempt from taxation any mortgagee's interest in real estate.

SECTION 4. Subsection 10*a*, of section 1038, of the statutes is repealed.

SECTION 5. Subsection 11, of section 1038, of the statutes is amended to read: (Section 1038.) 11. Wearing apparel, including personal ornaments and jewelry habitually worn, family portraits, private libraries, not exceeding in value two hundred dollars, kitchen and other household furniture and furnishings, * * * one piano, organ or melodeon and other musical instruments, * * * and also growing crops, including ginseng and other medicinal plants.

SECTION 6. Subdivision (*a*), of subsection 11*a*, of section 1038, of the statutes is amended to read: (Section 1038, 11*a*.) (*a*) The tools of a mechanic kept and used in his trade and farm, orchard and garden machinery implements and tools * * * actually used in the operation of any farm, orchard or garden.

SECTION 7. Subdivision (*b*), of subsection 11*a*, of section 1038, of the statutes is amended to read: (Section 1038, 11*a*.) (*b*) One watch carried by the owner. * * *

SECTION 8. This act shall take effect and be in force from and after its passage and publication.

Approved July 13, 1911.

(Endorsements:) The within application is hereby refused. Aug. 10th, 1911. L. H. Bancroft, Attorney General.

45 (Endorsements:) Original. State of Wisconsin. In Supreme Court. In the Matter of the Application of Harry W. Bolens, to the Hon. Levi H. Bancroft, Attorney General of the State of Wisconsin, to move in the Supreme Court of said state for leave to bring an action in the name of said state against James A. Frear, Secretary of State of Wisconsin, et al., to enjoin them and each of them from taking action under Chapter 658 of the Laws of Wisconsin for 1911, on the ground of the unconstitutionality of said chapter. Petition of Harry W. Bolens. Carpenter & Poss, Petitioner's Attorneys. Filed Aug. 10, 1911. Clarence Kellogg, Clerk of Supreme Court, Wis.

46 STATE OF WISCONSIN,
In Supreme Court:

In the Matter of the Application of Harry W. Bolens, to the Honorable Levi H. Bancroft, Attorney General of the State of Wisconsin, to move in the Supreme Court of said State for leave to bring an action in the name of the State against James A. Frear, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, members of said Tax Commission, to enjoin them and each of them from taking action under Chapter 658 of the Laws of Wisconsin for 1911, passed at the General Session of the Legislature of Wisconsin, in 1911, which said Chapter is entitled: "An Act to create sections 1087*m*-1 to 1087*m*-30 inclusive, and amend section 1036; subsection 10 of section 1038; subsection 11, of section 1038; subdivision (*a*), of subsection 11*a*, of section 1038*a*; subdivision (*h*), of subsection 11*a*, of section 1038; and repeal subsection 10*a*, of section 1038 of the statutes, relating to the taxation of incomes, and making an appropriation therefor," on the ground of the unconstitutionality of said Chapter.

To the Honorable Levi H. Bancroft, Attorney General of the State of Wisconsin; the Hon. James A. Frear, Secretary of State of the State of Wisconsin; the Hon. Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, personally and as constituting said Tax Commission:

GENTLEMEN: Upon filing in the Supreme Court of the State of Wisconsin, the petition of the petitioner above named, addressed to the Hon. Levi H. Bancroft, Attorney General of the State of Wisconsin, and praying and requesting him because of the allegations in said petition and of the wrongs therein complained of, and to protect said petitioner and all persons similarly situated and to protect all the taxpayers of the State of Wisconsin against the threatened invasion of their rights and liberties, as therein set forth, and for as much as all said persons are remediless in the premises without the interposition of the Supreme Court of this state; to move in the said Supreme Court at the opening of said Court on the 12th day of Sep-

47 tember, 1911, for leave to bring action in said Court against said James A. Frear, Secretary of State of the State of Wisconsin, to enjoin him from auditing the bills and salaries and compensation of the Income Tax Assessors, deputies and assistants, the county boards of review and one Kossuth Kent Kennan, or any part thereof; and against the said Andrew H. Dahl, State Treasurer of the State of Wisconsin, to enjoin him from paying such bills, salaries, and compensation or any part thereof, and against the Tax Commission of the State of Wisconsin and its members, the said Haugen, Lyons and Adams, to enjoin it and them from appointing the said Kennan to the position alleged in said petition and from appointing said Income Tax Assessors, and County Boards of

Review, and from fixing their salaries or compensation; and to enjoin each and every one of said persons above named from taking any steps in pursuance of Chapter 658 of the Laws of Wisconsin for 1911; and for such other and further order, decree, judgment, or relief as to the said Court shall seem just and equitable, needful and right in the premises so as fully to protect and secure the said rights and privileges guaranteed to the people of this state, by the Constitution of the United States and the Amendments thereto and the Constitution of the State of Wisconsin and the Amendments thereto:

And said Attorney General having refused so to move:

You will please take notice, that said petitioner will move the said Supreme Court in its court room in the Capitol, in the city of Madison, county of Dane and State of Wisconsin, at the opening of said Court on the 12th day of September, 1911, or as soon thereafter as counsel can be heard, for leave to commence in said Court, a suit for said state and in the name of the Attorney General thereof, and upon relation of the said petition against you and each of you and for the purposes in said petition set forth, a copy of which petition has heretofore been served upon the Attorney General and a copy of which will be served upon you on your demand therefor.

Dated, Milwaukee, Wisconsin, this 9th day of August, 1911.

CARPENTER & POSS,
Attorneys for Harry W. Bolens, Petitioner Above Named.

48 (Endorsements:) Original. State of Wisconsin. In Supreme Court. In the Matter of the Application of Harry W. Bolens, to the Hon. Levi H. Bancroft, Attorney General of the State of Wisconsin, to move in the Supreme Court of said State for leave to bring an action in the name of said state against James A. Frear, Secretary of State of Wisconsin, et al., to enjoin them and each of them from taking action under Chapter 658 of the Laws of Wisconsin for 1911, on the ground of the unconstitutionality of said Chapter. Notice of Motion after refusal of Attorney General to present motion, etc. Service of within notice admitted Aug. 10th, 1911. L. H. Bancroft, Attorney General, by Russell Jackson, Deputy Attorney General. Received one copy of within notice and refusal this 10th day of August, A. D. 1911. A. T. Torge, Ass't Sec'y of State. Received one copy of within notice and refusal this 10th day of August, 1911. A. H. Dahl, State Treasurer. Received one copy of within notice of refusal this 10th day of August, 1911. Thos. E. Lyons. Received one copy of within notice of refusal this 10th day of August, 1911. T. S. Adams. Received one copy of within notice of motion and refusal this 22nd day of August, 1911. State Tax Commission, by Nils P. Haugen. Received one copy of within notice of motion and refusal this 22nd day of August, 1911. Nils P. Haugen. Carpenter & Poss, Attorneys for Petitioner. Filed Aug. 22, 1911. Clarence Kellogg, Clerk of Supreme Court, Wis.

49 And afterwards, to-wit: on the 12th day of September, A. D. 1911, the same being the second day of said term, the following proceedings were had in said cause in this court:—

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

Injunction.

And now at this day came the said petitioner, by Paul D. Carpenter, Esq., and moved the Court now here for leave to bring suit as set forth in and by his said petition;

And the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

50 And afterwards, to-wit: on the third day of October, A. D. 1911, the same being the seventh day of said term, the following proceedings were had in said cause in this court:—

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

Injunction.

On giving the usual bond in the sum of Five Hundred Dollars, ($500) to indemnify the State against costs and damages, leave is granted to bring action as prayed in the petition; Complaint to be served within fifteen (15) days from this date and demurrer thereto within five (5) days thereafter; cause placed on present calendar and assigned for argument at foot of first assignment in November; plaintiff's briefs to be served on or before November first and defendants' briefs on or before first day of the assignment.

The question of jurisdiction of this court is left to be considered with the merits and counsel are expected to argue that question with their argument on the merits.

51 STATE OF WISCONSIN,
In Supreme Court:

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS,
Plaintiff,
vs.
JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

Know all men by these presents, That we, the undersigned, Harry W. Bolens, as principal, and the American Surety Company of New York as surety, are held and firmly bound unto the State of Wisconsin in the penal sum of Five Hundred Dollars ($500), for which

payment well and truly to be made we hereby bind ourselves, our heirs, personal representatives, assigns and successors, jointly and severally, firmly by these presents. Sealed with our seals this 11th day of October, 1911.

The condition of the above obligation is such that

Whereas by the mandate of the Supreme Court of the State of Wisconsin permission has been granted for the bringing of the above entitled action.

Now therefore, if the parties hereto shall well and truly indemnify said State of Wisconsin against costs and damages in said action, then and in that event this obligation to be null and void, otherwise to remain in full force and effect.

(Signed) HARRY W. BOLENS. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK.

[CORPORATE SEAL.]

By WILLIAM N. LANE,
Resident Vice President.

In Presence of:

CHARLES W. STARK, Jr.
BEATRICE H. BAXTER.

Attest:

L. D. SCHULTZ,
Resident Ass't Sec.

52

State of Wisconsin,
Department of Insurance.

The American Surety Company, located at New York, in the state of New York, having furnished to the undersigned Commissioner of Insurance due proof of its possessing the qualifications required by the laws of the state of Wisconsin relating to Surety-ship Corporations, and having complied with said laws,

Now, therefore, This is to Certify that said Company has qualified and is authorized to transact within this state the business of a surety-ship corporation under the Statutes of this state until the first day of March, A. D. 1912, unless this certificate be sooner revoked.

Witness my hand and official seal at Madison, Wisconsin, this first day of March, A. D. 1911.

[DEPARTMENT SEAL.]

HERMAN L. EKERN,
Commissioner of Insurance.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, number 69 issued to the American Surety company and on file in this department, and that the same is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this first day of September, A. D. 1911.

[DEPARTMENT SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

53 (Endorsements:) I approve the foregoing bond as to form and sufficiency this 12th day of October, 1911. Clarence Kellogg, Clk Sup. Ct. Original. State of Wisconsin. In Supreme Court. The State of Wisconsin upon the Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, Secretary of State of the State of Wisconsin, et al., Defendants. Bond. Carpenter & Poss, Attorneys at Law, Wells Bldg., Milwaukee. Filed Oct. 12, 1911. Clarence Kellogg, Clerk of Supreme Court, Wis.

54 STATE OF WISCONSIN,
In Supreme Court:

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS, Plaintiff,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

The State of Wisconsin to the said Defendants and Each of Them:

In accordance with the mandate of the aforesaid Court, dated the 3rd day of October, 1911, you are hereby summoned to appear within five (5) days after service of this summons and the complaint hereunto annexed, exclusive of the day of service, and defend the above entitled matter in the Court aforesaid, and in case of your failure so to do, said plaintiff will move that judgment be rendered against you according to the demand of said complaint, of which a copy is herewith served upon you.

HARRY W. BOLENS, *Relator.*

In the name of—
LEVI H. BANCROFT,
Attorney General.

By leave of Court,

CARPENTER & POSS,
Attorneys for Relator and Plaintiff.

P. O. Address: 602-608 Wells Building, Milwaukee, Milwaukee County, Wisconsin.

55 STATE OF WISCONSIN,
In Supreme Court:

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS
Plaintiff,
vs.
JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin, and Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

Harry W. Bolens, a citizen of the State of Wisconsin, who, in the name of the Attorney General sues for said State, and in this behalf (leave for that purpose having been duly granted by this Court) comes here into the Supreme Court of judicature of said state, at the capitol, in the city of Madison, and for said State, and in the name of the Attorney General thereof, being duly authorized thereunto as aforesaid, gives the Court to understand and be informed and for complaint alleges and shows:

That on the 10th day of August, 1911, the Attorney General of the State of Wisconsin filed or caused to be filed in this Court a statement dated the 10th day of August, 1911, and signed by him officially, wherein and whereby he declined to commence the suit in this Court to test the validity of the so-called Income Tax Act, to-wit, Chapter 658 of the Laws of Wisconsin for 1911, passed at the general session of the legislature of Wisconsin in 1911, upon the relation of Harry W. Bolens as petitioner or otherwise; and that leave to commence the same was granted by the order of this Court on the 3d day of October, 1911; and that pursuant to said order
56 the relator duly gave and filed in the office of the Clerk of this Court, a bond to the State in the sum of five hundred dollars ($500.00), approved by a justice of this Court, to indemnify the State against the costs of said action.

That the said relator, Harry W. Bolens, is, and for the past ten years has been, a citizen of the United States, and of the State of Wisconsin, and a resident of the city of Port Washington, in the county of Ozaukee, in the State of Wisconsin; and that, during many years last past, he has been and now is a taxpayer in said city, county and state, and for many years last past has paid in said city of Port Washington large amounts of money for state, county, city and school taxes.

That the above named defendant, James A. Frear, is Secretary of State of the State of Wisconsin, duly elected, qualified and acting as such.

That the above named defendant, Andrew H. Dahl, is State Treasurer of the State of Wisconsin, duly elected, qualified, and acting as such.

That the above named defendants the Tax Commission of Wisconsin, is a commission duly organized and existing under and by virtue of the Laws of the State of Wisconsin.

That the above named defendant, Nils P. Haugen, Thomas E.

Lyons and Thomas S. Adams, are the members of said Tax Commission of the State of Wisconsin.

That in the month of January, 1911, the legislature of the State of Wisconsin did duly convene in regular session and did thereafter enact as in the attempted discharge of its constitutional power, the said Chapter 658 of the Laws of Wisconsin for 1911 entitled

"An act to create sections 1087*m*-1 to 1087*m*-30, inclusive, and amend section 1036; subsection 10 of section 1038; subsection 11 of section 1038; subdivision (*a*) of subsection 11*a* of section 1038*a*; subdivision (*b*) of subsection 11*a* of section 1038; and repeal subsection 10*a* of section 1038 of the statutes, relating to taxation of incomes, and making an appropriation therefor."

That said plaintiff has caused to be prepared a copy of said Chapter 658 of the Laws of Wisconsin for 1911, which said copy is a true copy of said Chapter and of the whole thereof, and has caused the same to be hereunto annexed and marked Exhibit "A," and makes the same a part of this complaint, as though the same were herein and here at length set forth.

57 That said Chapter was introduced in the Senate of the State of Wisconsin as Senate Bill No. 573 by the Special Committee on Income Tax, on the 19th day of May, 1911, and was on the same day referred to said Special Committee on Income Tax; that on the first day of June, 1911, said Committee recommended adoption and passage of Senate Substitute Amendment No. 1 to the said bill; that on the 9th day of June, 1911, Senate Amendments 1, 2, 3, 4, 5, 6 and 7 to said Senate Substitute Amendment No. 1 were received and on the same day said Amendment No. 3 was withdrawn and the matter was laid over to the 14th day of June, 1911; that on the 14th day of June, 1911, Senate Amendments Nos. 1, 2 and 5 to said Senate Substitute Amendment No. 1 were adopted, Senate Amendment No. 4 was refused adoption, Senate Amendments Nos. 6 and 7 were withdrawn, Senate Amendments Nos. 8, 9, 10 and 11 to said Senate Substitute Amendment No. 1 were offered and adopted, and said Senate Substitute Amendment No. 1 so amended was adopted and the bill was ordered engrossed by a vote of nineteen to seven, with two paired and five absent or not voting, and that upon the same day the rules were suspended by unanimous consent and the same was passed by a vote of twenty to six with two paired, and 5 absent or not voting; that on the 16th day of June, 1911, the Assembly of the State of Wisconsin received said bill from the Senate, read it for the first and second times, and referred it to the Committee on Taxation; that on the 20th day of June, 1911, the said Committee on Taxation reported and recommended said bill with Assembly Substitute Amendment No. 1 for concurrence; that on the 22nd day of June, 1911, Assembly Substitute Amendment No. 2 was received, Assembly Amendments Nos. 1, 2 and 3 to Assembly Substitute Amendment No. 1 were offered and the bill with pending amendments was made a special order for the 23rd day of June, 1911; that on the 23rd day of June, 1911, the bill being taken up as a special order, Assembly Amendment No. 1 to Assembly Substitute Amendment No. 1 was offered, a motion was duly made that Assembly Substitute Amendment No. 2 be taken up before As-

sembly Substitute Amendment No. 1, a point of order was
58 raised that Assembly Substitute Amendment No. 2 was not
properly before the house for the reason that the bill had not laid over until the next calendar day and the rules had not been suspended and the speaker then and thereupon held that the bill having been made a special order, it was open to action, including all amendments, and therefore that said point of order was not well taken; the motion that Assembly Substitute Amendment No. 2 be taken up before Assembly Substitute Amendment No. 1 was lost, Assembly Amendment No. 1 to Assembly Substitute Amendment No. 1 was adopted, Assembly Amendment No. 2 to Assembly Substitute Amendment No. 1 was rejected, Assembly Amendment No. 3 to Assembly Substitute Amendment No. 1 was rejected, Assembly Amendment No. 4 to Assembly Substitute Amendment No. 1 was offered, read and adopted, Assembly Amendment No. 5 to Assembly Substitute Amendment No. 1 was offered and rejected. Assembly Amendment No. 6 to Assembly Substitute Amendment No. 1 was offered, read and adopted; Mr. Bichler moved that Assembly Substitute Amendment No. 2 be substituted for Assembly Substitute Amendment No. 1 and Mr. Ingram moved that Assembly Substitute Amendment No. 2 be rejected; that no action was taken on the motion so made as aforesaid by Mr. Bichler, as plaintiff is informed and believes, but the motion so made as aforesaid by Mr. Ingram was adopted and thereafter Assembly Substitute Amendment No. 1 was adopted; a motion that the bill be non-concurred in was lost and the bill was ordered to third reading; the rules in the face of objection were suspended by a vote of fifty-nine to twenty, with twenty-one absent or not voting; by unanimous consent the bill was read a third time by title only and was concurred in by a vote of fifty-four to twenty-five with twenty-one absent or not voting; and by unanimous consent the bill was ordered messaged to the Senate at once; that on the 24th day of June the Senate was informed that the Assembly had amended said bill and concurred in it as amended; that on the 27th day of June, 1911, the said bill was in the Senate placed at the foot of the calendar and was on the same day made a special order for
the 28th day of June, 1911, and on said 27th day of June,
59 1911, with unanimous consent, Senate Amendments Nos. 1, 2, 3 and 4 to Assembly Substitute Amendment No. 1 were offered; on the 28 day of June, 1911, Senate Amendments Nos. 1, 2, 3, 4, 5 and 6 to Assembly Substitute Amendment No. 1 were refused adoption, and said Assembly Substitute No. 1 was then concurred in by a vote of fifteen to fourteen with four absent or not voting; a motion to reconsider said vote was made and was laid over by a vote of seventeen to eleven with five absent or not voting; on the 29th day of June, 1911, the motion for reconsideration was lost by a vote of eleven to fourteen, six being paired and two absent or not voting.

That the said defendant James A. Frear, Secretary of State, the said defendant Andrew H. Dahl, State Treasurer, the said defendant Tax Commission of the State of Wisconsin and the said defendants Haugen, Lyons and Adams, as members of said Tax Commission, as

relator is informed and believes, have recognized and still do recognize said Chapter 658 as a valid and constitutional enactment empowering them and each of them and binding upon them and each of them.

That the said defendant Tax Commission of the State of Wisconsin and said defendants Haugen, Lyons and Adams, as members of said Tax Commission, have appointed one Kossuth K. Kennan of Milwaukee, Wisconsin, as chief of the so-called Income Tax Bureau of said defendant Tax Commission of the State of Wisconsin, fixed his salary at $4,000 per annum, and that the said Kennan has accepted said position and begun work in the preparation of blank forms for making assessments and reports, in accordance with said Chapter 658, and in the preparation of rules and regulations for the guidance of assessors of income to be appointed under said Chapter 658 and other work in connection with such position; and that the said Kennan has been so appointed and his salary so fixed and he has accepted said appointment and entered upon said duties under and by virtue of the pretended power attempted to be delegated to said defendant Tax Commission of the State of Wisconsin, by said Chapter 658.

And said plaintiff further alleges, on information and belief, that the said defendant Tax Commission of the State of Wisconsin, and the said defendants Haugen, Lyons and Adams, have divided the State of Wisconsin into assessment districts in accordance with said Chapter 658 and have threatened and do threaten that they will select and appoint boards of review for one or more counties and assessors of income for one or more assessment districts in the State of Wisconsin, and that they will authorize such assessors to appoint such deputies and other assistants as may appear to be required for the performance of their alleged duty; that said defendant the Tax Commission of the State of Wisconsin, and said defendants Haugen, Lyons and Adams as members of said Tax Commission, have selected and appointed or soon will select and appoint such boards of review and assessors of income and that they have authorized or soon will authorize such assessors to appoint such deputies and assistants; that said defendant Tax Commission of the State of Wisconsin and said defendants Haugen, Lyons and Adams as members of said Tax Commission, have threatened and do threaten that they will fix the salaries and compensation of the members of said boards and of said assessors, deputies and assistants, and that they in fact have fixed or soon will fix such salaries and compensation; all in virtue of the pretended authority sought to be granted by said Chapter 658; and that said defendant James A. Frear, Secretary of State, has threatened to audit the bills, salaries, and compensation of the members of said boards and of said assessors, deputies and assessors and of said Kennan, and that in fact he has so audited or is about to audit the same, and that the said defendant Andrew H. Dahl, State Treasurer as aforesaid, has threatened to pay said bills, salaries and compensation and in fact has paid or soon will pay some part thereof, that said plaintiff further alleges on information and belief, that said defendant Tax Commission of the State of Wisconsin, and said defendants Haugen, Lyons and Adams, as members of

said Tax Commission, have threatened and do threaten that they will on or shortly after the first day of January, 1912, together with said assessors of income, so appointed, or soon to be appointed, as hereinbefore alleged, proceed to assess by the pretended authority sought to be granted by said Chapter 658 every income received during the preceding calendar year alleged to be liable to taxation under the provisions of said Chapter 658, and that they will proceed to en-
61 force the collection of said alleged taxes in the manner sought to be provided in said Chapter 658 and otherwise, and that they are about to carry such threats into execution to the oppression of the people of said state, including the relator and all persons similarly situated.

And said plaintiff further alleges that the aforesaid acts not yet performed will be speedily performed by said defendants unless they be restrained therefrom, by the judgment of this Court, and that by the aforesaid acts great and needless expense has been and will be entailed upon the taxpayers of said state, for the payment of salaries, expenses and compensation of said Kennan and of the members of said boards of review, and of said income tax assessors, deputies and assistants, and for the expenses of said defendant Tax Commission of the State of Wisconsin, and said defendants Haugen, Lyons and Adams as members of said Tax Commission, in this regard, and that a multiplicity of suits will ensue; whereby all taxpayers of said state, will suffer irreparable injury and that they have no adequate remedy at law, nor has any of them any adequate remedy at law, nor any remedy whatever without the interposition of this Court.

Said plaintiff further shows to this Court on the advice of counsel learned in the law and alleges the fact to be that said Chapter 658 of the Laws of Wisconsin for 1911, is wholly null, void and of none effect, for that many sections, subsections and subdivisions of said Chapter violate many articles and sections of the Constitution of the United States and the amendments thereto, and the Constitution of Wisconsin and the amendments thereto, and, among others, said plaintiff respectfully specifies and alleges as follows:

That the whole of said Chapter and particularly Section 1087*m*-1, being a part of said Chapter, are in violation of Article I, section 1, of the Constitution of Wisconsin, in that they impose a retrospective tax upon a source of taxation never heretofore taxed in Wisconsin, and thereby deprive many persons within the jurisdiction of said state of certain inherent rights; that said section is further in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons
62 within the jurisdiction of said State of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*a*), being a part of said Chapter, is in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin of

their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*c*), being a part of said Chapter, is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin, of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, and further is in violation of Article VIII, Section 1, of the Constitution, in that it violates as to many persons within the jurisdiction of said state the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*d*), being a part of said Chapter, is in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state; and further — in violation of Article VIII, Section 1, of the Constitution in that it violates as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform.

That Section 1087*m*-2, subsection 2, subdivision (*e*), being a part of said Chapter, is in violation of the amendments to the Constitution of the United States, Article XIV, Section 1, in that it
63 deprives many persons within the jurisdiction of said State of Wisconsin of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state the rule that taxation shall be uniform.

That Section 1087*m*-2, subdivision 3, being a part of said Chapter, is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state; and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform.

That Section 1087*m*-3, subdivision (*b*), being a part of said Chapter, is in violation of Article I, Section 10, of the Constitution of the United States in that it impairs the obligation of contracts, and is also in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within and without the jurisdiction of said State of Wisconsin of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of

said state, and also is in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that it violates as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform.

That Section 1087*m*-3, subdivision (*b*) and 1087*m*-4, subdivision (*d*), being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state the rule that taxation shall be uniform.

64 That Section 1087*m*-5, subsection 1, subdivision- (*a*), (*b*), (*c*), (*d*) and (*e*), being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform.

That Section 1087*m*-5, subdivision (*e*) and Section 1087*m*-6, subsection 1, and the whole of said subsection and its subdivisions, being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, of their property, without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state the rule that taxation shall be uniform.

That Section 1087*m*-6, subsection 2, and the whole of said subsection and all the subdivisions thereof being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform.

That Section 1087*m*-7, being a part of said Chapter, is in violation of Article I, Section 1, of the Constitution of Wisconsin, in that it imposes conditionally a double retrospective tax upon a source of taxation never heretofore taxed in Wisconsin, and thereby deprives many persons within the jurisdiction of said state of certain rights;

and further is in violation of the Amendments to the Con-
65 stitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said State of Wisconsin of their property without due process of law, and denies the equal protection of the laws to many persons within the jurisdiction of said state, and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that it violates as to many persons within the jurisdiction or said state, the rule that taxation shall be uniform; and further is in violation of Article IV, Section 1, of the Constitution of Wisconsin, in that it delegates legislative functions to the Courts.

That Section 1087*m*-8, subsection 2, being a part of said Chapter, and Section 1087*m*-14, being a part of said Chapter, are in violation of Article XIII, Section 9, of the Constitution of the State of Wisconsin, in that they provide for the appointment of assessors of incomes for each assessment district, and County Boards of Review, so-called, by the said Tax Commission.

That Section 1087*m*-8, subsection 5, being a part of said Chapter, is in violation of Article XIII, Section 9, of the Constitution of Wisconsin, in that it authorizes the said Tax Commission to authorize any assessor of incomes to appoint such deputies and other assistants as may be required for the proper performance of his alleged duties, and in that it fails to require from such other assistants any constitutional oath.

That Section 1087*m*-9, and Section 1087*m*-14, both being a part of said Chapter, are in violation of Article IV, Section 1, of the Constitution of Wisconsin, in that they contain an unlawful delegation of legislative power to the Tax Commission, namely, the power to fix the salaries of such assessors, deputies and assistants, and members of the County Boards of Review, and further are in violation of Article IV, Section 26, of the Constitution of Wisconsin, in that it permits the said Tax Commission to increase or diminish the salaries of said assessors, deputies and assistants, during their term of office, and in that it makes such a limitation upon such salaries that in case of a decrease in the assessment of any assessment district, the said Tax Commission might be bound so to reduce such salaries, or the same might be automatically reduced.

66 That Section 1087*m*-10, subsections 2, 3, 4 and 5, being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state, and further is in violation of Article VIII, Section 1, of the Constitution of Wisconsin in that they violate as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform.

That Section 1087*m*-10, subsection 6, being a part of said Chapter, is in violation of Article IV, Section 26, of the Constitution of Wisconsin, in that it authorizes the diminishing of the salaries of said assessors and deputy assessors during their terms of office, and

is also in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives the said assessors and deputy assessors of their property without due process of law, and is also in violation of Article VII, Section 2 of the Constitution of Wisconsin, in that it vests said Tax Commission with judicial powers; and is also in violation of Article I, Sections 5 and 7 of the Constitution of Wisconsin, in that it deprives said assessors and deputy assessors of the right to be heard by counsel and of the right to a trial by jury.

That Section 1087*m*-11, subsection 2, and Section 1087*m*-12, subsection 2, both being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin, of their property without due process of law, and deny the equal protection of the laws to many persons within the jurisdiction of said state; and further are in violation of Article VIII, Section 1, of the Constitution of Wisconsin, in that they violate as to many persons within the jurisdiction of said state, the rule that taxation shall be uniform, and are also in violation of Article VII, Section 2, of the Constitution of Wisconsin, in that they vest judicial powers in said Tax Commission, and are also in violation of Article I, Sections 5 and 7 of the Constitution of
67 Wisconsin, in that they deprive all persons therein mentioned of the right to be heard by counsel and of the right to a trial by jury.

That Section 1087*m*-11, subsections 4 and 5, and Section 1087*m*-12, subsection 3, being a part of said Chapter, are in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that they deprive many persons within the jurisdiction of said State of Wisconsin of their liberty and property without due process of law, and in that they deny the equal protection of the laws to many persons within the jurisdiction of said state, and are further in violation of Article I, Section 1, of the Constitution of Wisconsin, in that they deprive many persons within the jurisdiction of said state of certain inherent rights.

That Section 1087*m*-16, subsection 5, being a part of said Chapter is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons within the jurisdiction of said state of their liberty without due process of law, and further is in violation of Article I, Section 1, of the Constitution of Wisconsin in that it deprives many persons within the jurisdiction of said state of certain inherent rights, and further is in violation of Article VII, Section 2, of the Constitution of Wisconsin.

That Section 1087*m*-18, being a part of said Chapter, is in violation of Article I, Section 9, of the Constitution of Wisconsin, in that it deprives many persons within the jurisdiction of said state of all certain remedy in the laws for injuries or wrongs which they may receive in their property and denies to them the right to obtain justice freely and without being obliged to purchase it, completely

and without denial, promptly and without delay, conformably to the laws.

That Section 1087*m*-22, and the whole thereof, being a part of said Chapter, is in violation of the Amendments to the Constitution of the United States, Article XIV, Section 1, in that it deprives many persons of their property without due process of law, and further in that by requiring impossibilities, it will subject many persons within the jurisdiction of said state to the penalties in said Chapter provided, without fault of theirs.

That the aforesaid and many other sections, subsections and subdivisions of said Chapter violate the aforesaid and many other articles and sections of the Constitution of the United States and the Amendments thereto, and the Constitution of Wisconsin and the
68 Amendments thereto.

Wherefore, said plaintiff demands judgment against the defendants above named perpetually restraining and enjoining the said James A. Frear, Secretary of the State of Wisconsin, from auditing the bills, salaries and compensation of the said Income Tax Assessors, deputies and assistants, and County Boards of Review, and of the said Kossuth K. Kennan, or any part thereof; and against the said Andrew H. Dahl, State Treasurer of the State of Wisconsin, perpetually restraining and enjoining him from paying such bills, salaries and compensation or any part thereof; and against the Tax Commission of the State of Wisconsin, and the said Nils P. Haugen, Thomas E. Lyons and Thomas S. Adams, as members of said Tax Commission, perpetually restraining and enjoining it and them from selecting or appointing such Income Tax Assessors or County Boards of Review, and from fixing their salaries or compensation; and further perpetually restraining and enjoining the aforesaid parties and each of them from taking any steps whatsoever in pursuance of said Chapter 658 of the Laws of the State of Wisconsin for 1911; and for such other and further order, decree, judgment, or relief as to the said Court shall seem just and equitable, needful and right in the premises, so as fully to protect and secure the said rights and privileges guaranteed to the people of this State by the Constitution of the United States and the Amendments thereto, and the Constitution of the State of Wisconsin, and the Amendments thereto.

HARRY W. BOLENS,
Relator.

In the name of

LEVI H. BANCROFT,
Attorney General.

By leave of Court.

CARPENTER & POSS,
Attorneys for Relator and Plaintiff.

STATE OF WISCONSIN,
Milwaukee County, ss:

Harry W. Bolens, being first duly sworn, deposes and says that he is the relator named in the foregoing complaint; that
69 he has read the same and that the same is true of his own knowledge, except as to the matters therein stated to be

alleged upon information and belief and as to these matters he believes it to be true.

HARRY W. BOLENS.

Subscribed and sworn to before me this 13th day of October, A. D. 1911.

[SEAL.] CHAS. W. STARK, JR.,
Notary Public, Milwaukee County, Wisconsin.

My Commission expires January 10th, 1915.

(Endorsements.)

Due service of the within summons and complaint admitted this 14th day of October, 1911.

J. A. FREAR.
Secretary of State.

Due service of the within summons and complaint admitted this 14th day of October, 1911.

A. H. DAHL,
State Treasurer.

Due service of the within summons and complaint admitted this 14th day of October, 1911.

STATE TAX COMMISSION.
By NILS P. HAUGEN, *Chairman.*

Due service of the within summons and complaint admitted this 14th day of October, 1911.

T. S. ADAMS.

Due service of the within summons and complaint admitted this 14th day of October, 1911.

THOS. E. LYONS.

Due service of the within summons and complaint admitted this 14th day of October, 1911.

NILS P. HAUGEN.

70 (Endorsements:) Original. The State of Wisconsin. In Supreme Court. The State of Wisconsin upon the Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, et al., Defendants. Summons and Complaint. Carpenter & Poss, Attorneys at Law, Wells Bldg., Milwaukee. (Filed Oct. 14, 1911. Clarence Kellogg, Clerk Supreme Court, Wis.)

71 STATE OF WISCONSIN:

In Supreme Court.

THE STATE OF WISCONSIN upon the Relation of HARRY W. BOLENS, Plaintiff,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer of the State of Wisconsin; The Tax Commission of the State of Wisconsin; Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, Members of said Tax Commission, Defendants.

The defendants demur to the complaint herein on the grounds that it appears upon the face of said complaint:

1. That this Court has no jurisdiction of the person of the defendants, or any of them, or of the subject of the action.

2. That the plaintiff and relator has not legal capacity to sue in this, that the action is in substance and effect against the State of Wisconsin and that the consent of said state to be sued therein has never been given.

3. That the complaint does not state facts sufficient to constitute a cause of action.

L. H. BANCROFT,
Attorney General;
RUSSELL JACKSON,
Deputy Attorney General,
Attorneys for Defendants.

72 (Endorsements:) Original. State of Wisconsin. In Supreme Court. State of Wisconsin on Relation of Harry W. Bolens, Plaintiff, vs. James A. Frear, Secretary of State, et al., Defendants. Demurrer to Complaint. Service of the within demurrer admitted this 19th day of October, 1911. Carpenter & Poss, Attorneys for Plaintiff. Filed Nov. 21, 1911. Clarence Kellogg, Clerk of Supreme Court, Wis.

73 And afterwards to-wit: on the 20th day of November, A. D. 1911, the same being the twenty-fourth day of said term, the following proceedings were had in said cause in this Court:

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,

vs.

JAMES A. FREAR, Secretary of State, et al., Defendants.

Instruction.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Benjamin Poss, Esq. and C. F. Fawsett, Esq., for the said plaintiff and by Messrs. Russell Jackson, Deputy Attorney General, J. E. Dodge and George C. Greene, for

the said defendant-, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

74 And afterwards, to-wit: on the 9th day of January, A. D. 1912, the same being the first day of said term, the judgment of this court was rendered in words and figures following, that is to say:

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

Instruction.

Opinion by Chief Justice Winslow.

This cause came on to be heard on the demurrer of the said defendants to the complaint of the said plaintiff, and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this court, that the demurrer to the complaint herein be, and the same is hereby, sustained, and that the complaint herein be, and the same is hereby dismissed without costs.

Justices Kerwin & Barnes took no part in the decision of the question of jurisdiction.

75 Thereupon the opinino of the court by Chief Justice Winslow, concurring opinion by Justice Marshall and dissenting opinion of Justice Tinlin were filed in words and figures following, that is to say:

76 STATE OF WISCONSIN:

In Supreme Court, August Term, 1911.

State, No. 14

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

August Term, 1911.

No. 237.

ARTHUR WINDING et al., Appellants,
vs.
JAMES A. FREAR et al., Respondents.

WINSLOW, *C. J.:*

These are actions in equity, brought for the purpose of enjoining the Secretary of State and other state officers, including the Tax

Commission, from paying out any state moneys, or doing any other administrative acts, in the enforcement of the newly passed income tax law of this state, known as chapter 658, Laws of 1911, on the ground that said act is unconstitutional.

The Bolens action is an action sought to be brought within the original jurisdiction of this court, after refusal by the Attorney General to bring it. This court, upon application for leave to bring the action upon the relation of Bolens (a taxpayer), granted such leave, but expressly provided in the order that the question whether such action was an action properly within the original jurisdiction of this court should be reserved and argued with the demurrer upon the merits.

The Winding Case is an action originally brought in the circuit court of Dane County by various persons and corporations who claim that they will be injuriously affected in various different ways by the provisions of the law. A demurrer on the three grounds of want or jurisdiction, want of legal capacity to sue, and insufficiency of facts having been sustained by the circuit court, the plaintiffs appeal to this court, and all the cases were argued together; briefs being also filed by several members of the bar as amici curiæ.

The law which is attacked in these actions adds 30 sections to the statutes, and also makes very substantial changes by amendment and repeal in sections 1036 and 1038 of the existing statutes, relating to the taxation of personal property. The first section of the law is numbered 1087*m*1, and provides generally for the taxation of all incomes received during the year 1911, and annually thereafter.

Section 1087*m*2 provides:

(1) That the term "person," as used in the act, shall include "any individual, firm, copartnership, and every corporation, joint-stock company, or association organized for profit and having a capital stock represented by shares," unless otherwise stated.

(2) That the term "income" shall include:

a. All rent of real estate, including estimated rental of residence property occupied by the owner.

b. Interest on loans or evidence of debt of any kind.

c. Wages, salaries, or fees derived from services, provided that salaries of public officers are not to be included in those cases where the taxation thereof would be repugnant to the Constitution.

d. All dividends or profits from stock or from the purchase and sale of any property acquired within three years previously or from any business whatever.

e. Royalties derived from the possession or use of franchises or legalized privileges of any kind.

f. All other income from any source, except such as is exempted by the act.

(3) That "the tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every non-resident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within

the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (*c*) of section 1770*b*, as far as applicable."

Section 1087*m*3 provides, in substance, for the following deductions by corporations and joint-stock companies:

a. Sums paid within the year for personal services of all officers and employes actually employed in the production of the income.

b. Other ordinary and necessary expenses paid within the year in the maintenance and operation of its business and property, including reasonable depreciation of the property from which the income is derived. All bonds issued by a corporation shall be deemed an interest in the property and business of the corporation, and
78 so much of the interest on the bonds as is represented by the ratio of the total property located and business transacted in the state to the whole property and business of the corporation as provided in subdivision 3 of 1087*m*2 shall be subject to taxation at the same rate as the income and shall be assessed to the bondholders under the general designation of the bondholders of the particular corporation on the property of the corporation prior to other liens, and, unless paid by the bondholders, shall be enforced against the corporation, which may deduct the amount of the tax from the next interest payment on the bonds.

c. Losses sustained during the year not compensated for by insurance or otherwise.

d. Sums paid within the year for taxes imposed by any other state upon the source from which the income taxed by this act is derived.

e. Dividends or income received during the year from stocks or interest in any firm, corporation, or joint-stock company, the income of which has been assessed under this act.

f. Interest received from bonds or securities exempt from taxation under United States laws.

By section 1087*m*4 it is provided, in substance, that persons other than corporations and joint-stock companies shall be allowed the following deductions:

a. Ordinary and necessary expenses actually paid in carrying on the business from which the income is derived, including a reasonable allowance for depreciation in the property from which the income is derived.

b. Losses during the year not compensated by insurance or otherwise.

c. Dividends or incomes from stocks or interest in any firm or corporation, the income of which has been assessed under this act.

d. Interest paid during the year on existing indebtedness.

e. Interest on bonds or securities exempt under United States laws.

f. Salaries received from the United States by United States officials.

g. Pensions received from the United States.

h. Taxes (other than inheritance taxes) paid during the year on the property or business from which the income is derived.

i. Devises, bequests, or inheritances received during the year upon which an inheritance tax has been paid.

j. Life insurance to the amount of $10,000 received by persons legally dependent on the decedent.

Section 1087*m5* provides in substance for the following exemptions:

(1) To an individual, $800.

b. To a husband and wife, $1,200.

c. For each child under 18 years, $200.

d. For each additional person legally and wholly dependent on the taxpayer for support, $200.

79

e. These exemptions do not apply to non-residents, nor to firms, corporations, or joint-stock companies. In computing such exemptions and the amounts of taxes payable under section 1087*m7*, the income of a wife living with her husband shall be added to the husband's, and the income of each child living with its parent or parents shall be added to the parents' income.

(2) Income of mutual, savings, or loan, and building associations, and of any religious, scientific, educational, benevolent, or other association not organized or conducted for pecuniary profit.

(3) Income from property and privileges by persons now required to pay taxes or license fees into the state treasury in lieu of taxes. Such persons shall continue to pay taxes and license fees as heretofore.

(4) Income received by the United States, the state, and all counties, cities, villages, school districts, or other political units of the state.

Section 1087*m6* provides, in substance, that the tax, after making such deductions and exemptions, shall be computed at the following rates:

(1)	*a.* On first $1,000 or part thereof,		1%
	b. " second " "		1¼%
	c. " third " "		1½%
	d. " fourth " "		1¾%
	e. " fifth " "		2%
	f. " sixth " "		2½%
	g. " seventh " "		3%
	h. " eighth " "		3½%
	i. " ninth " "		4%
	j. " tenth " "		4½%
	k. " eleventh " "		5%
	l. " twelfth " "		5½%
	On any sum exceeding $12,000,		6%

(2) Provided that the tax on corporations and joint-stock companies (after deductions) shall be computed as follows:

a. If the income equals 1 per cent. or less of assessed value of property used in acquiring the income, the rate shall be ½ of 1 per cent. of such income.

b. If the income equals more than 1 but not more than 3 per cent. of such value, 1 per cent. of the income.

c. If more than 2, but not more than 3, per cent., 1½ per cent. of the income.

d. If more than 3, but not more than 4, per cent., 2 per cent. of the income.

e. If more than 4, but not more than 5, per cent., 2½ per cent. of the income.

f. If more than 5, but not more than 6, per cent., 3 per cent. of the income.

g. In like manner the tax shall increase at the rate of ½ of 1 per cent. for each additional 1 per cent. or fraction thereof which the taxable income bears to the property employed in the acquisition of the income, until the rate of profits equals 12 per cent. of
89 property employed in the acquisition of the income, when rate shall continue as a proportional rate of 6 per cent. of such taxable income.

Section 1087*m*7 provides as follows: "The Legislature intends subsection 2, of section 1087*m*6 of this act, to be a separable part thereof, so that said subsection may fail or be declared invalid without adversely affecting any other part of the act; provided that, in event of its failing or being declared invalid the incomes of corporations, joint-stock companies and associations shall be subject and shall be construed to have been subject to taxation at the rates specified in subsection 1, of section 1087*m*6, and said incomes shall be reassessed by the Tax Commission and taxed for the years for which the rates provided in subsection 2, of section 1087*m*6, shall have failed."

The next 14 sections of the act are administrative purely. By their terms the enforcement of the act is placed in the hands of the State Tax Commission, which is authorized and required to divide the state into taxing districts, and appoint an assessor of incomes in each district. The manner in which incomes are to be assessed and the taxes are to be collected is fully provided for, but it is not necessary to insert the provisions here, as no question is raised upon the details of these provisions.

Section 1087*m*22 provides, in substance, that the place at which the income tax shall be assessed, levied, and collected shall be determined as follows:

(1) Persons deriving income from within and without the state, or from two or more political subdivisions of the state, shall report the parts so separately derived in separate accounts in such form as the Tax Commission may prescribe.

(2) The entire taxable income of a resident of the state shall be combined for purpose of determining exemptions and rate of tax, but the taxes shall be paid to the several towns, cities, and villages in proportion to the income derived from each, counting the income

derived from without the state as derived from the town or city of the taxpayer's residence.

(3) The income of nonresidents derived from sources within the state shall be separately assessed and taxed in the town, city, or village from which it is derived.

(4) All laws not in conflict with this act, regulating time, place, and manner of collecting unpaid personal property taxes, shall apply to the income tax.

Section 1087*m*23 provides that the revenue derived from the income tax shall be divided 10 per cent. to the state, 20 per cent. to the county, and 70 per cent. to the town, city, or village in which it is assessed, levied, and collected.

Section 1087*m*25 abolishes the office of county supervisor of assessment on and after the first Monday in January, 1912, and provides that the county supervisor of incomes shall after that date perform all the duties imposed by law upon the county supervisor of assessment.

Section 1087*m*26 provides that any person paying a tax on personal property during any year may present his receipt therefor, and have the same accepted by the tax collector to its full amount in payment of income tax during said year, and that any bank paying taxes upon the shares of its individual stockholders may present the receipt therefor, and have the same accepted in payment of taxes upon the income of the bank during that year.

Section 1087*m*27 provides that nothing in the act shall affect in any way the taxes for the year 1911 or the collection or enforcement thereof.

By the amendment to section 1036 of the statutes of 1898 there is taken out of the items of personal property subject to taxation "all debts due from solvent debtors, whether on account, note, contract, bond, mortgage, or other security, or whether such debts are due or to become due," also "moneys," and by the amendment to subdivision 10 of section 1038, St. 1898, the following property is made exempt from taxation: "All moneys, all debts due or to become due to any person, and all stocks and bonds not otherwise specially provided for."

By the concluding sections of the act certain other changes are made in exemptions from taxation, which have the effect of somewhat enlarging such exemptions, especially in the line of personal ornaments and belongings and agricultural implements, but the details of these changes are not necessary to be stated.

At the inception of the Bolens Case, the question of jurisdiction is sharply raised; and it is very strongly argued, especially in a brief filed by Gen. F. C. Winkler, that this is not a case properly within the original jurisdiction of this court, as that jurisdiction has been defined and limited by the cases commencing with the Railroad Cases in 35 Wis. 425.

The argument, in brief, is that the action is nothing more nor less than a taxpayer's action; that such actions may properly be entertained in the case of illegal expenditures by cities, counties,

villages, or other municipalities, but cannot properly be brought against state officers, because, in effect, they are actions against the state, and the state cannot be sued without its consent. This objection might perhaps be summarily disposed of by a brief reference to the case of State ex rel. Raymer v. Cunningham, 82 Wis. 39, 51 N. W. 1133, where a case of similar character, brought on the relation of a taxpayer, was entertained and decided upon the merits against objection to the jurisdiction, and by further reference to the cases of State ex rel. Garrett v. Froehlich, 118 Wis. 129, at
82 page 143, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985, State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894, and In re Filer & Stowell Co., 146 Wis. 629, 132 N. W. 584, in each of which cases the right to maintain similar actions in this court is either impliedly or expressly asserted.

We do not feel, however, that we ought to dispose of this very important question without thoroughly examining it for several quite persuasive reasons. Reference to the cases just cited will show that the question never has been discussed in any opinion. In the Raymer Case, which is the first of the series and which was a case brought on the relation of a taxpayer to enjoin the payment of money to the state superintendent of public instruction, under a law which violated an express constitutional prohibition, it was said, in substance, that it was held in the case of State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561, that such an action was within the original jurisdiction of this court, and would be entertained. It is very clear that the Cunningham Case was not such a case, and involved very difficult considerations. The Cunningham Case was an action brought on the relation of the Attorney General to enjoin the Secretary of State from giving election notices under an apportionment law which was held to deprive a very large number of the voters of the state of political rights guaranteed to them by the Constitution. This was held to be an invasion of the liberties of the people, and hence the case came clearly within the original jurisdiction of this court as laid down in the Railroad Cases. No question of the wrongful expenditure of state funds, nor of a taxpayer's right to invoke the original jurisdiction of this court to prevent such expenditure, was involved or mentioned in the case.

No discussion of the question appears in the other cases cited, so it seems clear that the court has not yet taken up and considered the question as an original one.

It has been spoken of as a very important question, and advisedly so spoken of. Laws which are framed to meet and correct some existing situation deemed by the Legislature to be undesirable will generally, or at least frequently, involve the expenditure of some money in their enforcement. If, whenever such a law is passed, it is within the power of any taxpayer, however paltry his contribution to the public funds, to come into this court and invoke its original jurisdiction, and compel it to pass upon the validity of the law, it is not difficult to forecast the result. Every important law will be adverse to the interests of some taxpayers, and with such a

principle established this court stands in great danger of becoming to all intents and purposes a third chamber of the Legislature not named in the Constitution, but exercising a veto power over
83 the other houses when invoked by any taxpayer. The power to pass upon the constitutionality of laws when the question arises in the course of ordinary litigation is a great power, one to be exercised with the greatest possible caution and wisdom, but the power to take up and pass upon a law involving the expenditure of any state funds as soon as it is passed at the suggestion of any taxpayer and place a judicial veto upon its execution is a still greater one. No higher power than this can well be conceived in a government such as ours, certainly no power will demand greater wisdom in its exercise, if it exist.

[1] This court has unquestionably taken the position in a number of well-considered cases that the courts can and will restrain public officers from enforcing an unconstitutional law which invades private or public rights. State ex rel. Att'y Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061; Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785. But this court has clearly recognized that this power is a delicate one, and to be used only with a wise discretion. It was said in the last case cited that "it will not do to make of the courts, by equitable interference, a sort of a superior upper house to consider and pass, in general and particular as well, upon legislative enactments."

Concerning this power, Judge Dodge very rightly observes in his brief in the present case: "No higher power can be conceived than that of the judiciary to stay the action of the co-ordinate executive or Legislature from an act or policy which the latter conscientiously believe to be constitutional and for public welfare. As the power is transcendent, its exercise must be with caution and moderation; albeit with courage. The frequency of the attempts by individuals to invoke this power of veto invites the anxious consideration of the wisdom and propriety of its exercise in each case."

The question now before us is whether this court has consciously and advisedly held that it is sufficient to call for the exercise of this extreme power that a taxpayer come into court and demand that the public treasury be protected from the expenditure of funds under a law concerning whose constitutionality there may be doubt.

The consideration of this question has prompted us to make a re-examination of the entire question of the original jurisdiction of this court, and to make an attempt to classify the significant decisions upon the subject, in the hope that thereby the scope and purpose of that jurisdiction, as the court has endeavored to define and limit it, may be better understood. The results of this re-examination are now to be stated as briefly as——

84 The constitutional grant of jurisdiction to the Supreme Court (section 3, art. 7, Const. Wis.), after providing that it shall have appellate jurisdiction coextensive with the state, provides

that it "shall have a general superintending control over all inferio courts; it shall have power to issue writs of habeas corpus, man damus, injunction, quo warranto, certiorari, and other original an remedial writs, and to hear and determine the same."

Since the decision of the Railroad Cases, 35 Wis. 425, it has been very well understood that by this section of the Constitution three distinct and independent grants of power or jurisdiction were made to this court, viz.: (1) the appellate power; (2) the power of superintending control over inferior courts; and (3) the original jurisdiction to be exercised by means of the writs named in the section. We are only concerned here with the grant of original jurisdiction.

It will be at once noticed that this grant is practically unlimited in extent, except as it may be said to be limited by the scope of the writs named, and it is for this reason probably that (with the exception of the Blossom Case, 1 Wis. *317, to be referred to later) practically no attempt was made, prior to the decision in the Railroad Cases, to discuss the purpose or limits of the original jurisdiction. It was very frequently exercised, but plainly with no clear or logical idea of the purposes for which it was given to the court, unless possibly it may be said that there was the idea that the wrong to be redressed or prevented must be a wrong affecting the public, or some part of the public of a given locality or class, as distinguished from a wrong affecting individuals only.

Habeas corpus was so frequently used that the citation of the cases would be mere surplusage. Mandamus to compel official action by local or municipal officers was also very frequent. Thus the court entertained and decided upon the merits actions or mandamus to compel town assessors to reduce an assessment of personal property (State ex rel. v. Assessors, 1 Wis. *345); to compel a circuit judge to hold court in a new county (State ex rel. v. Larrabee, 1 Wis. *200); to compel county supervisors to strike property from the assessment roll (State ex rel. v. Supervisors, 3 Wis. *816); to compel highway commissioners to act (State ex rel. v. Bailey, 6 Wis. *291); to compel a school district clerk to make an official report to the town clerk (State v. Eaton, 11 Wis. *29); to compel county officers to locate their offices at a certain place as a means of testing the validity of county seat elections (Att'y Gen. v. Fitzpatrick, 2 Wis. *542; State v. Lean, 9 Wis. *279; State ex rel. v. Elwood, 11 Wis. *17; State ex rel. v. Saxton, 11 Wis. *27; State v. Fetter, 12 Wis. *566); to compel town supervisors to audit damages allowed in laying out a highway (State v. Wilson, 17 Wis.
85 *687); to compel a city council to levy and collect a tax to pay a judgment or pay the expense of work done for the city (State v. Madison, 15 Wis. *30; State v. Portage, 12 Wis. *562, s. c. 14 Wis. *550; State v. Beloit, 20 Wis. *79; State v. Milwaukee, 25 Wis. 122); to compel a county board to admit one duly elected as a member to sit and act as such (State v. Supervisors, 21 Wis. *443); to compel the mayor of a city to appoint certain officers (State v. O'Neill, 24 Wis. 149); to compel a city treasurer to deliver certain books to the county clerk (State v. Hundhausen, 26 Wis. 432); to compel the transfer of prisoners from the Milwaukee jail

to the house of correction (State v. Brunst, 26 Wis. 412, 7 Am. Rep. 84); to compel county supervisors to erect county buildings (State v. Supervisors, 24 Wis. 49); to compel county supervisors to provide certain officials with office rooms (State v. Supervisors, 25 Wis. 339); to compel the Milwaukee Chamber of Commerce to restore a member to his rights and franchises as a member (State ex rel. v. Chamber, etc., 20 Wis. *63), and doubtless other cases may be found.

It should be noted in this connection that in one case (State ex rel. v. Haben, 22 Wis. *101) the court declined to entertain an action of mandamus against the treasurer of a city to compel him to pay over the school moneys in his hands to the school board, giving as a reason that the remedy in the circuit court was ample. Judge Cole there states that the practice of applying to the Supreme Court for writs of mandamus against local officers was becoming very common, and that, in view of the increasing duties of the court, and in pursuance of a rule of court then recently adopted, it would be held in the future that: "Whenever there is anything in the application which shows that it would be unavailing if made at the proper circuit, or where from the nature of the questions involved it would seem necessary and proper that the suit be commenced in the Supreme Court, jurisdiction will be entertained; otherwise it will not be, but parties will be required to make their application to the circuit court." This rule seems, however, to have been more honored in the breach than in the observance, as the cases just cited, which came up after the Haben Case, abundantly testify.

Quo warranto cases to try the title to public office, from that of Governor down to school director, were very frequent. Thus the writ was used to try the title to the office of Governor in State ex rel. v. Barstow, 4 Wis. *567; of district attorney in State ex rel. v. Ely, 4 Wis. *420; of treasurer of a city in State ex rel. v. Von Baumbach, 12 Wis. *310; of school director in State ex rel. v. Perkins, 13 Wis. *411; of circuit judge in State ex rel. v. Messmore, 14 Wis. *115; of sheriff in State v. Orvis, 20 Wis. *235; of justice of the peace in State ex rel. v. Tierney, 23 Wis. 430; of supervisor in State v.
86 Riordan, 24 Wis. 484; of superintendent of the poor in State v. Abert, 32 Wis. 403; of treasurer of an incorporated church benevolent association in State v. Conklin, 34 Wis. 21; and there are numerous similar cases. As tending to explain the large number of these cases involving only small local offices, it should be noticed that by chapter 23 of the Session Laws of 1855 any person claiming to be entitled to hold "any public office" usurped by another was given the right to file in the Supreme Court an information in the nature of a quo warranto with or without the consent of the Attorney General. While the code of Pleading and Practice which was passed the following year (chapter 120, Laws 1866) entirely revised the practice in such cases, and contains no such sweeping provision, still resort seems to have been had to the Supreme Court in practically all cases of disputed title to office until the decision in the Railroad Cases.

Quo warranto to forfeit corporate charters for abuse or nonuse of

franchises was also brought in State v. Milwaukee G. L. Co., 29 Wis. 454, 9 Am. Rep. 598, and in State v. W. W. Co., 34 Wis. 197.

The foregoing citations by no means cover all of the cases in which the original jurisdiction was used prior to the Railroad Cases, but it is believed that they cover all that are of any significance, except the Blossom Case (which is to be soon considered), and it is also believed that they conclusively demonstrate that there was in the judicial mind during that period no serious thought that the original jurisdiction given to this court was intended to be or ought to be limited by excluding any particular class of cases therefrom, except probably cases involving mere individual wrongs, with which the public was in no manner concerned.

Relating to this subject, Judge Dixon might well say, as he did in his brief in the case of Att'y Gen. v. Eau Claire, 37 Wis. 400, at page 411: "It is not surprising that the court looked in vain to the bar for assistance in the argument of the Railway Cases when we reflect that both court and bar had been wandering in utter darkness for a period of more than 25 years." It is very evident that Judge Dixon knew whereof he spoke when he wrote these words. During 15 years of the 25 he had been the leader of the wanderers.

It is quite plain, we think, that, however valuable the cases which we have thus briefly reviewed may be as authorities on the general propositions of law involved in them (and many of them are very valuable in this respect), they have absolutely no value on the question of the extent of the original jurisdiction of the court, for that question was never discussed or considered in any of them, and they have been gathered together here for the simple purpose of demonstrating their worthlessness as precedents upon that
87 question, and to prevent either bench or bar from placing reliance upon them so far as that question is concerned in the future.

The case of Att'y Gen. v. Blossom, 1 Wis. *317, has not been included in the foregoing list because in that case, which was the first case where the original jurisdiction was challenged, there was an illuminating discussion in the opinion of Justice Smith, not only of the existence of any original jurisdiction in this court, but also of the purposes which were intended to be accomplished by the exercise of that jurisdiction. After meeting the contention that the court had only appellate jurisdiction, and demonstrating that the armory of common-law writs with which the Constitution endowed the court in the last clause of the section quoted were original in their functions, and necessarily implied the exercise of original jurisdiction, he used these pregnant words, remarkable in their strength and wisdom now, and vastly more remarkable when it is reflected that they were written nearly 60 years ago: "And, why was original jurisdiction given to the Supreme Court, of these high prerogative writs? Because these are the very armor of sovereignty. Because they are designed for the very purpose of protecting the sovereignty and its ordained officers from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its perogatives and franchises against usurpation. The convention

might well apprehend that it would never do to dissipate and scatter these elements of the state sovereignty among five, ten, twenty, or forty inferior tribunals, and wait their tardy progress through them to the supreme tribunal, upon whose decision must finally depend their efficacy. To preserve the liberties of the people, and to secure the rights of its citizens, the state must have the means of protecting itself." Here was clearly expressed the great idea that the original jurisdiction was given to this court in order that the state might use it to protect itself and its sovereignty and the liberties of the people at large.

Strange, indeed, it seems that this idea so forcibly expressed in 1853 should have been completely ignored and forgotten for more than 20 years thereafter, notwithstanding the fact that applications for the exercise of that jurisdiction were increasing in number year by year. When, however, in 1874, the state, through its chief law officer, essayed to use the original jurisdiction for the purpose of curbing the great railroad companies of the state and compelling them to obey an act fixing rates of carriage for freight and passengers, the question of the extent of the jurisdiction was again sharply brought to the mind of the court, and it was philosophically discussed by Chief Justice Ryan in words which have ever since that time been regarded as authoritatively determining the attitude of this court upon the question. They have been often quoted and
88 applied since that time, and are very familiar. In brief the principle there decided was that, in order to put in motion the original jurisdiction of this court, the question must not only be publici juris—i. e., a question of public right—but it must be a question "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." Att'y Gen. v. Railroad Co., 35 Wis. 425.

In the case of Attorney General v. Eau Claire, immediately following the Railroad Cases, 37 Wis. 400, where the Attorney General invoked the original jurisdiction to restrain the alleged illegal obstruction of a navigable river flowing into the Mississippi, the same doctrine was announced and somewhat elaborated upon, especially with regard to the term publici juris. In this opinion it was said: "Of course, every question of municipal taxation is publici juris; but it is equally so whether it be raised by a taxpayer, or by the municipality, or by the state. It is not enough to put in motion the original jurisdiction of this court that the question is publici juris. It should be a question quod ad statum reipublicæ pertinet. * * * And, though the question did not arise in this case, it is quite evident from all that has any bearing on it in Atty. Gen. v. R. R. Companies that, to bring a case properly within the original jurisdiction of this court, it should involve in some way the general interest of the state at large. It is very true that the whole state has an interest in the good administration of every municipality; so it has in the well-doing of every citizen. Cases may arise, to apply the words of C. J. Stow, geographically local, political not local; local in conditions, but directly affecting the state at large. Cases may occur in which the good government of a public corporation, or the proper exercise of the franchise

of a private corporation, or the security of an individual, may con
cern the prerogative of the state. The state lends the aid of its pre
rogative writs to public and private corporations and to citizens i
all proper cases. But it would be straining and distorting the notio
of prerogative jurisdiction to apply it to every case of personal, cor
porate or local right, where a prerogative writ happens to afford a
appropriate remedy. To warrant the assertion of original jurisdic
tion here, the interest of the state should be primary and proximate
not indirect or remote, peculiar perhaps to some subdivision of the
state, but affecting the state at large in some of its prerogatives, rais
ing a contingency requiring the interposition of this court to pre
serve the prerogatives and franchises of the state, in its sovereign
character; this court judging of the contingency in each case for
itself. For all else, though raising questions publici juris, ordinary
remedies and ordinary jurisdictions are adequate. And only
89 when, for some peculiar cause, these are inadequate, will the
original jurisdiction of this court be exercised for protection
of merely private or merely local rights. * * * It was suggested
that we should establish general rules governing our original juris
diction. That would be too bold an undertaking to venture on.
Rules will arise, as cases come here, far more safely and properly
than they could be prescribed in advance. We can now only declare
the views which influence us in passing upon this motion. It is
sufficient here to hold that proceedings to restrain municipal under
takings or municipal taxation in ordinary cases belong appropriately
to the original jurisdiction of the circuit, and not of this court.
These are questions publici juris, as are title to local public office,
performance of local official duty, use of local highways, maintenance
of local public buildings, abuse of local power or franchise, and kin
dred local matters. But these are not generally questions directly
involving the sovereign prerogative or the interest of the state at
large, so as to call for the prerogative jurisdiction of this court. As
a rule, no extraordinary jurisdiction is necessary or proper for them;
the ordinary jurisdiction of the circuit court being ample. Practi
cally it would be impossible to take jurisdiction of them all here; and
we intend to assume jurisdiction of none of them, which are not taken
out of the rule by some exceptional cause. When they are governed
by some peculiarity which brings them within the spirit and object
of the original jurisdiction of this court, we will entertain them.
Otherwise they will be left to the circuit courts. And this we under
stand to be the true spirit and order of the constitutional grant of
jurisdiction." In this case also was laid down the general principle
that, while jurisdiction would never be assumed to enforce a mere
private right, still jurisdiction would not be refused because there
might be a private relator in the case who possessed a private interest
bound up with the public interest, if in fact there was the necessary
public interest before defined; and that the court in rendering judg
ment in such a case would not ignore the private interest of the re
lator, but administer full relief; but, on the other hand, if the private
right of a relator and the public right of the state met in the same
litigation, the private right of the relator might entirely disappear,

and the relator drop out, but the court would still proceed and vindicate the public right, if there be a public right separable and distinct from the private right. This doctrine was more fully elaborated and stated in State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, which will be referred to later in this opinion.

The Railroad Cases and the Eau Claire Case, taken together, harmoniously following and more fully developing the great idea first announced in general terms by Judge Smith in the Blossom
90 Case, may be truly said to have established the fundamental reason for the existence of the original jurisdiction of this court, and the limits within which, in view of that reason, the court would endeavor to confine its exercise. No attempt was made in either case to mark out or define in advance the particular questions or kinds of questions which would be considered as affecting the "sovereignty of the state, its franchises, or prerogatives, or the liberties of its people." Such an attempt would manifestly have been as unwise as it would have been futile. Human prescience is not equal to such a task. So the court wisely contented itself with announcing the general principle, leaving itself free to judge in each case whether the contingency which justified and required the use of the jurisdiction had arisen. Since the decision of those cases this court has faithfully endeavored to follow the general rules laid down in them. Numerous applications for the exercise of the original jurisdiction have been made, and of these many have been granted and some have been refused. The question of the application of the general rules aforesaid has arisen and been discussed and decided in a number of cases presenting widely different problems. Sufficient time has now elapsed so that it should be possible to draw from these decisions some general conclusions as to the limits of the jurisdiction as the court has administered it. If this can be done, it certainly ought to be helpful in the future administration of the jurisdiction, not because it will or can put up the bars so that no future case can be brought within the jurisdiction unless it has its prototype in the past, but because every discussion and ruling upon the question as a new case is presented should be helpful in developing some philosophical and orderly rules for the application of the general abstract principles laid down in the two cases last named to concrete cases as they arise in the future.

With this idea in mind, a brief review of the significant cases decided since the decisions in the Railroad Cases will now be undertaken, and an attempt will be made to classify them.

I. The most numerous cases probably are the habeas corpus cases, and they may well be first disposed of. The first of these cases where the question of the jurisdiction was discussed was the Pierce Case, 44 Wis. 411, where, in spite of the vigorous protest of Chief Justice Ryan, it was held that the state had so vital an interest in the liberty of every one of its citizens that the question whether a citizen was unlawfully deprived of that liberty involved the interest of the public at large. The reasoning by which the unlawful imprisonment of a single citizen is held to involve the interests of the public at large, so as to justify the use of the original jurisdiction of the Supreme

Court, may seem somewhat strained, but the decision has been
91 followed without question in numerous cases since that time,
and, furthermore, it is to be noticed that the legislation of the state from the earliest days of the state had provided for the issuance of the writ by any justice of the Supreme Court, and by chapter 45 of the Laws of 1864 had further provided that all applications for the writ on behalf of a person confined in the state prison must be made to the Supreme Court, or one of the justices thereof. This latter provision has remained upon the statute book ever since (section 3409, Stats. Wis. 1898), and this court has held that it applies to applications made by persons confined upon conviction for felony in the Milwaukee House of Correction as well. State v. Ryan, 99 Wis. 123, 74 N. W. 544. It does not seem necessary or useful to cite the numerous habeas corpus cases which have been entertained by this court since the Pierce Case.

II. Next may be considered the quo warranto cases, and of these we have found but five cases which seem of any significance, namely, State ex rel. Wood v. Baker, 38 Wis. 71; Atty. Gen. v. W. W. Ry. Co., 36 Wis. 467; State ex rel. Atty. Gen. v. M. L. S. & W. Ry. Co., 45 Wis. 579; State ex rel. v. Shaughnessey, 86 Wis. 647, 57 N. W. 1105; In re Town of Holland, 107 Wis. 178, 83 N. W. 319.

The first of these cases was brought to try the title to the office of county clerk, and it was held that contests concerning the title to county offices were not within the jurisdiction marked out for itself by the court in the Railroad Cases, but that because the title of the judge of the circuit court to the office of Congressman depended on the same votes which were questioned in the case, and hence he could not with propriety sit. The case came within the exception suggested in the Eau Claire Case, namely, cases where the ordinary jurisdiction of the circuit — is entirely inadequate. The evident meaning of this case is that contests over local offices will not be entertained unless the situation be such that the remedies in local courts are absolutely inadequate. It may well be doubted whether such a case as the Wood Case would now be entertained, in view of the case with which under present laws another judge can be at once called in to try a case where the circuit judge is disqualified or declines to sit. The second and third cases named were actions brought to forfeit corporate charters granted by the state to railroad companies because of breach of duty on the part of the companies. They unquestionably fall within the jurisdiction as defined in the Railroad Cases, for in such an action the state is suing to punish the abuse or misuse of franchises granted by it in its sovereign capacity. In this connection it is pertinent to note that the Legislature, by section 3240 et seq. of
92 the statutes, have for many years provided for actions in the name of the state to vacate corporate charters, which may be brought either in the Supreme or circuit court, as this court may direct. See State ex rel. Lederer v. I. I. Co., 88 Wis. 512, 60 N. W. 796, 43 Am. St. Rep. 918. In the Shaughnessey Case it was sought to use the original jurisdiction of this court to try the title to the office of justice of the peace, and jurisdiction was declined on the ground that it was a local matter purely, which did not affect the

state at large. For the same reason jurisdiction was declined in the Town of Holland Case, in which it was sought to test the validity of the incorporation of a village.

III. Next may well be classed the two great cases of Atty. Gen. v. Railroad Companies, 35 Wis. 425, and Atty. Gen. v. Eau Claire, 37 Wis. 400, in the first of which the state sued to prevent the great public service corporations of the state from systematically violating and defying laws regulating their rates in the interest of the whole people, which laws were in effect amendments to the corporate charters of the companies; and in the second of which the state sued to prevent a purpresture in one of the great navigable rivers of the state connecting with the Mississippi river, which the state is bound to keep open as a common highway to the people of this state and of the United States. Upon the same general ground this court later entertained an action on the relation of the Attorney General to prevent the tearing up of a railroad; the idea being that a railroad operated under a franchise granted by the state is a state highway whose destruction affects the interests of the state at large. State ex rel. v. Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915. The great public interests involved in these cases are so apparent as to obviate the necessity of comment upon them. In the case of State v. St. Croix Boom Co., 60 Wis. 565, 19 N. W. 396, however, the court declined jurisdiction of a case very similar to the Eau Claire Case, because the St. Croix river was a river on the boundary of the state, as to which the state was under no trust to keep it open.

IV. In the next class may be placed the cases where it has been sought by mandamus or mandatory injunction to compel a state officer to perform a ministerial duty. Under this head, the cases involving performance of important duties imposed on state officers by the general election laws form a striking group, the first of these cases being the case of State ex rel. McDill v. Cate, 36 Wis. 498, where mandamus was sought to compel the state board of canvassers to declare a certain result from the returns of a congressional election, and the court deemed the case one wherein the original jurisdiction should be exercised, although the office in issue was
93 in a sense local, because the circuit judge himself was the opposing candidate, and could not act judicially upon such a question, hence the remedy in the circuit court was utterly inadequate. It is instructive to note that after this decision, by chapter 231 of the Session Laws of 1880, the Legislature passed an act regulating the procedure in mandamus cases brought in the Supreme Court against any board of canvassers to compel the delivery of a certificate of election to either of the offices of member of the Legislature, congressman, or presidential elector; thus apparently giving the legislative sanction to the idea that controversies concerning the canvass of votes at general elections for either of such offices so far affected the prerogatives of the state or the liberties of the people, or both, as to come fairly within the original jurisdiction of the court. The substance of this provision has ever since remained a part of the mandamus statute. Section 3452, Stats. Wis. 1898. Other cases where the original jurisdiction has been invoked to compel the per-

formance of official duty imposed by general election laws are the cases of State ex rel. Kustermann v. Frear, 145 Wis. 294, 130 N. W. 489, State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964, State ex rel. Bancroft v. Frear, 144 Wis. 79, 128 N. W. 1068, 140 Am. St. Rep. 992, and State ex rel. Rinder v. Goff, 129 Wis. 658, 109 N. W. 628, 9 L. R. A. (N. S.) 916. The first of these last-named actions was practically the same as the McDill Case, the second and third were cases involving the duty of the Secretary of the State, under general election laws, to place the names of certain persons upon the official ballot as nominees of a great political party for state offices, and the Rinder Case was a very good example of the exceptional cases where, though the office in issue was purely local, jurisdiction was assumed because of the absolute inadequacy of the remedy in the lower courts, and the abstract question involved was a question affecting the interests of the entire public.

Another group of significant cases under the fourth head are the mandamus actions brought to compel payment of funds from the state treasury to the persons or corporations alleged to be entitled thereto by law. In this group fall State ex rel. v. Harshaw, 76 Wis. 230, 45 N. W. 308, brought to compel the State Treasurer to pay over certain moneys in the state treasury to certain counties; State ex rel. New Richmond v. Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, 58 L. R. A. 739, brought to compel the State Treasurer to pay over to the city of New Richmond an appropriation made by the Legislature on account of damages suffered by the city in a cyclone; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985, brought to compel auditing of claims against the state for the Keeley treatment of drunkards at private sanitariums; State ex rel. Buell v. Frear, 146 Wis. 94 291, 131 N. W. 832, 34 L. R. A. (N. S.) 480, brought to compel auditing of salaries of the civil service commission and its employés; and State ex rel. Bashford v. Frear, 138 Wis. 536, 120 N. W. 216, brought to compel auditing of the salary of a justice of this court.

Under this head, also, naturally fall the cases involving the issuance or revocation of licenses and patents, and of these the case of State ex rel. Drake v. Doyle, 40 Wis. 175, 186, 22 Am. Rep., 692, is the most significant. Here mandamus was invoked against the Secretary of State upon the mere relation of a private individual in order to compel that officer to revoke the license of a foreign insurance company, because it had committed an act which, under the state law, worked a forfeiture of its license. In this case the Attorney General appeared for the Secretary of State, and suggested that the relator's personal grievance had been settled. Nevertheless the action went on as the suit of the state to vindicate and preserve "the prerogatives of the state in its sovereign character," and a peremptory mandamus was awarded.

Other cases of this general nature are State ex rel. v. Timme, 60 Wis. 344, 18 N. W. 837, brought to compel the issuance of a patent by the commissioners of public lands; State ex rel. Abbott v. McFetridge, 64 Wis. 130, 24 N. W. 140, to compel issuance of a license to a railroad company to do business, on the allegation that it had

fully paid the legal license fees; also, the case of State ex rel. Cov. M. B. Ass'n v. Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271, brought to compel the State Insurance Commissioner to issue a license to a foreign insurance company which had fully complied with the law. This last case, however, was directly overruled in the case of In re Court of Honor, 109 Wis. 625, 85 N. W. 497, where this court refused to entertain an exactly similar action, on the ground that the primary right sought to be vindicated was private, and the public right, if involved at all, was only incidentally affected, and hence the circuit court was the appropriate tribunal to pass on the question in the first instance. Whether this ruling does not in effect negative jurisdiction in the Timme and McFetridge Cases just cited may be a question of some doubt, but it is not necessary to determine it here. The case of State v. Miles, 52 Wis. 488, 9 N. W. 403, where the original jurisdiction was used on the relation of the State Treasurer to compel a county treasurer to make an official return, is not significant as the question of jurisdiction was not raised.

V. In the last class fall the cases where it is sought to restrain a state officer (and in exceptional cases a county officer) from committing an unlawful act which will affect the prerogatives or sovereignty of the state, or the liberties of the people. The most conspicuous examples in this class of cases are the so-called "Gerrymander Cases," State ex rel. Atty. Gen. v. Cunningham, 81
95 Wis. 440, 51 N. W. 724, 15 L. R. A. 561, and State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27, the first of which was brought by the Attorney General himself, and the second by a private relator on leave of the court, after the Attorney General had refused to act. In these cases it was sought to enjoin the Secretary of State from carrying out the terms of an apportionment law, on the ground that the law violated the commands of the Constitution, and was void. Here for the first time this court held that it could and would on the relation of a private citizen prevent a state officer from enforcing an unconstitutional law which injuriously affected the liberties of the people as an unfair and unconstitutional division of the legislative election districts of the state must necessarily do. In neither of these cases was jurisdiction sustained, because of the alleged unlawful expenditure of public funds, nor because of the fact that the relator was a taxpayer, but in both the ground was that an injury to the people of the state was about to be committed by depriving many voters of their just and constitutional rights in the election of the legislative bodies of the state under the form of a law which violated the express command of the Constitution. The evident idea was that the relator was in no sense the plaintiff. He simply brought the matter to the attention of the court, and, when he had performed this function, he ceased to be of importance. The suit became from its inception the suit of the state to vindicate the liberties of its people generally.

Following these cases at a considerable distance in time, but practically identical in principle, are the so-called "Twenty per cent." cases—State ex rel. v. Phelps, 144 Wis. 1, 128 N. W. 1041, and State

ex rel. v. Frear, 144 Wis. 58, 128 N. W. 1061—where, on the relation of private individuals, state and county officers were sought to be enjoined from enforcing a law requiring that, in order to be represented on the official ballot, a political party must cast at the primary 20 per cent. of its vote for Governor at the last preceding general election. The ground taken was that this provision was an unreasonable, unconstitutional restriction or infringement on the freedom of the ballot, and hence it affected the liberties of the people. Although objection to the jurisdiction was formally taken in these cases, it was not pressed, it was not discussed, and the court simply said that it saw no reason why jurisdiction should be exercised.

In this class, if anywhere, must naturally fall the case of State ex rel. Raymer v. Cunningham, 82 Wis. 39, 51 N. W. 1133, which has been previously cited, brought on the relation of a taxpayer to prevent the payment of salary to a state officer over and above the amount limited by the Constitution. As has been before said in this opinion, the jurisdiction in that case was sustained by brief reference to the first Gerrymander Case, which is quite plainly a different case. Unquestionably the real ground was that the Legislature was by express command of the Constitution prohibited from paying to the state superintendent out of the state funds any sum exceeding $1,200 per annum. Hence the law attacked in that case, which directed payment of a greater sum every year was absolutely void, and the state itself was entitled to the intervention of the extraordinary jurisdiction of this court to protect itself from unconstitutional and unlawful depletion of its treasury by its own officers.

In both the Rosenbein Case, 138 Wis. 173, 119 N. W. 894, and the Filer & Stowell Case, 146 Wis. 629, 132 N. W. 584, the applications to bring actions on the relation of taxpayers were denied, because it was considered in each case that no unlawful expenditure of funds by state officers was threatened, but in the first-named case it was expressly said and in the second it was assumed that, in order to prevent illegitimate expenditure of state funds, an equitable action on the initiative of a taxpayer, after refusal by the Attorney General, would be properly within the original jurisdiction of this court. There are several other cases which have more or less bearing on the general question which will be briefly mentioned. In the case of In re Hartung, 98 Wis. 140, 73 N. W. 988, it was sought to use the original jurisdiction of this court by way of injunction to put an end to a public nuisance in the town of Wauwatosa, consisting of the depositing of garbage on the surface of land to the discomfort of a very large neighborhood, but it was held that such a wrong, though public, was not a wrong affecting the sovereignty, franchises, or prerogatives of the state, or the liberties of the people at large, and that the remedy was in the local courts. This seems to be an entirely logical application of the general principle laid down in the Railroad Cases that, even though a question be publici juris, it will not call for the use of the original jurisdiction if it be merely local in its effect. The sequel to this case, which appears by reference to State ex rel. v. Milwaukee, 102 Wis. 509, 78 N. W. 756, is also instructive. After the

decision In re Hartung, supra, the relator went to the circuit court, and, after refusal by the Attorney General, was allowed to bring an action in the circuit court in the name of the state to enjoin the further continuance of the alleged public nuisance. The case was tried on the merits and an injunction refused, and on appeal to this court it was held that the circuit court was not given the writ of injunction for prerogative purposes, as this court was, and that hence the action below was never in fact an action by the state, notwithstanding its title, but was an action by a private party.

In view of this last-named decision, the recent case of State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, becomes interesting, if not important. This case was an action brought in
97 the circuit court in the name of the state, after refusal to act by the Attorney General, upon the relation of a taxpayer; the object being to enjoin the Secretary of State and State Treasurer from carrying out the provisions of the primary election law, and especially from auditing or paying claims or bills for expenses arising under the law, on the ground of unconstitutionality of the law. The jurisdiction of the circuit court in this case was not challenged by demurrer, nor was it raised or considered either in the lower court, or in this court, yet it seems quite manifest that it was a case where injunction was used in the circuit court for prerogative purposes contrary to the principle laid down in the case of State ex rel. Milwaukee, just cited. However, as the question of jurisdiction passed sub silentio, the case is not significant.

Before proceeding to draw general conclusions from these decisions as to the field of the original jurisdiction, so far as any field has been marked out by the decisions, it may be well, in order to avoid misapprehension, to notice the fact that the Legislature by section 3200, Stats. 1898, has consented that the state may be sued in the Supreme Court by any person having a just claim which has been disallowed by the Legislature. Actions brought under this section are, of course, brought by virtue of the consent of the state, without which the sovereign itself cannot be sued. Nothing said in this opinion is to be construed as having any bearing on this section or the actions brought under it.

The affirmative result of the significant cases since the Railroad Cases is, as it seems to us, that the original jurisdiction of this court may be rightly invoked when there is a showing made either that (1) a citizen is wrongfully deprived of his liberty; (2) a state office has been usurped; (3) a franchise grantable only by the state has been usurped, abused or forfeited; (4) a law regulating public service corporations in the interest of the people is systematically disobeyed and set at naught; (5) a navigable river, which the state is bound to keep open as a highway for all, is obstructed or encroached upon, or a public railroad built under a charter granted by the state is about to be destroyed; (6) a state officer declines to perform a ministerial duty, in the performance of which the people at large have a material interest; (7) a state officer is about to perform an official act materially affecting the interests of the people at large which is contrary to law or imposed upon him by the terms of a law

which violates constitutional provisions; and (8) the situation i such in a matter publici juris that the remedy in the lower courts i entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied. It is not meant by thi attempted classification that no cases which do not fall within one or the other of the classes can ever call for the exercise of the
98 original jurisdiction, but simply that cases falling within these general classes have been held to be properly within the original jurisdiction.

In addition to those eight affirmative propositions, the decided cases justify the statement of several negative propositions which are also helpful upon the general question. These are: (1) A case, although involving a question publici juris, will not come within the jurisdiction if it be only local in its effect, subject only to the exception named in the eighth class. (2) A case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained. (3) A case will not be dismissed, however, because there is a private interest involved with the public interest, provided the private interest be incidental merely, and the vindication of the public right be the primary purpose of the action. (4) An action involving a private as well as a public interest will not be dismissed merely because the private interest may drop out, provided the public and private interests be severable and the public interest still exists. (5) The Constitution has not given the circuit court the power to use the writ of injunction as a prerogative jurisdictional writ, as it has been given to the Supreme Court, hence the circuit court has not the power in an action not brought by the Attorney General, but on the relation of a private citizen only, to use the writ for prerogative purposes.

It seems to us now that the real fundamental philosophy of the original jurisdiction and its use has not been at all times fully apprehended by the court, even since the elaborate discussion in the Railroad and Eau Claire Cases, but, after this review of the authorities, it seems quite simple, and it really comes down to a few propositions which when thoroughly understood solve many difficulties.

This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people. The state uses it to punish or prevent wrongs to itself or to the whole people. The state is always the plaintiff, and the only plaintiff, whether the action be brought by the Attorney General, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit. He is a mere incident. He brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the state. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the state's action proceeds to vindicate the public right. The fact that in many cases, as, for example, cases of unlawful im-
99 prisonment, the private wrong and the public wrong are so closely identified that the ending of the private wrong neces-

sarily puts an end to the public wrong, makes no difference with the principle.

These propositions, if correct, and we believe they are, demonstrate very clearly that there can be no such thing as a taxpayer's action (as that action is known in the circuit courts) brought in the Supreme Court within the original jurisdiction. The philosophy of the taxpayer's action in the circuit court is that the taxpayer is a member of a municipal corporation, who, by virtue of his contributions to the funds of the municipality, has an interest in its funds and property of the same general quality as the interest of a stockholder in the funds of a business corporation, and hence, when corporate officers are about to illegally use or squander its funds or property, he may appeal to a court of equity on behalf of himself and his fellow stockholders (i. e., taxpayers) to conserve and protect the corporate interests and property from spoliation by its own officers.

The taxpayer himself is the actual party to the litigation, and represents not the whole public, nor the state, nor even all the inhabitants of his municipality, but a comparatively limited class, namely, the citizens who pay taxes. In short, he sues for a class.

No such thing is known in the exercise of the original jurisdiction of this court. In actions brought within that jurisdiction the state is the plaintiff, and sues to vindicate the rights of the whole people.

The Bolens Case cannot, therefore, be held to come within the original jurisdiction of this court, if it be a mere taxpayer's action.

This conclusion, however, by no means leads to the result that the original jurisdiction may not properly be used at the instance and upon the relation of a private individual to stay by appropriate writ the expenditure of the state's funds for purposes expressly or by necessary implication forbidden by the Constitution. Such use of funds by a state officer is certainly as much a breach of duty and an injury to the state as the refusal to pay out funds which have been lawfully appropriated, or the failure to obey the provisions of general election laws, but in such case the action is the action of the state as truly as if brought by the Attorney General, not the action of the taxpaying relator.

If this be true, we can see no logical escape from the conclusion that, where state officials are about to spend the state's money in executing an unconstitutional law, the state may prevent the threatened misapplication of its funds by the same means. This seems to us the only logical basis upon which the case of State ex rel. Raymer v. Cunningham, supra, can rest.

100 But it must be recognized that such a power is extreme. To arrest the hand of a state officer as he is about to carry out the command of the Legislature is indeed a serious step, one not to be taken summarily, or without profound consideration. As the power is great, it should be exercised with a wisdom and discretion commensurate with its greatness. No trivial grounds should impel the court to permit its exercise. This court will certainly not feel obliged in every case where there is a threatened expenditure of state funds under a law of doubtful constitutionality to allow an action of this nature to be brought in the name of the state, but will feel en-

tirely free to leave the question of constitutionality to be settled as it may arise in ordinary litigation. The defiance of express or implied constitutional commands may be so flagrant and patent as to make the exercise of this great power appear justifiable, if not absolutely necessary, and in such case it will be exercised courageously. This court will, however, judge of the exigency in each case as it arises, and will endeavor to guard the great power from being used in trifling cases or to accomplish ulterior purposes.

In the present case we go no further than to state these general principles. We do not find it necessary to decide whether the alleged illegal expenditure of funds alone presents a case of such exigency as to justify the use of the original jurisdiction of this court to prevent such expenditure. There are other and more important features in the present case which in our judgment present a proper case for the exercise of the original jurisdiction.

The law which is attacked here, if it be valid, makes a radical change in the present system of taxation over the whole state.

Since the days when Hampden refused to pay the ship money unjust taxation has been deemed by English speaking nations, at least, to vitally concern, if not to destroy, the liberties of the people. Such taxation has been deemed to justify armed resistance, and, if need be, revolution. Insistence upon it cost Charles I his life and England an empire. If this law in its essential provisions violates constitutional provisions, and hence is void, taxation under it is, of course, unjust, and the sums which may be collected under it are unlawfully collected. It makes in terms a very sweeping change in the methods of taxation in every taxing district of the state, and shifts the burdens of taxation so that many will pay more than under the old system, while many will pay less. If it should go into operation for a year or two and then be held unconstitutional in some actual case, the confusion created in the financial affairs of the state and of every municipality would unquestionably be great. We cannot but regard any serious question as to the constitutionality of such a law as a question seriously affecting the prerogative of the
101 state, as well as the liberties of the people; hence we conclude that the case presented is one justly calling for the exercise of the original jurisdiction of this court.

Many provisions of the law are attacked as offending against either the federal or the state Constitutions. We shall only treat the contentions which might from some point of view be considered as going to the validity of the whole act. As to those minor provisions, which are properly to be regarded as matters of detail, we shall express no opinion. This is in accord with our well-established custom in cases of this nature. Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785; State ex rel. Buell v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L. R. A. (N. S.) 480; Borgnis v. Falk Co. (present term) 133 N. W. 209. A few general observations may not be out of place before taking up for consideration the specific claims of unconstitutionality which are urged upon our attention.

The law in question, if valid, works a very important change in the general taxation policy of the state. Ever since the foundation

of the state government it has been the policy of the state to levy its general taxes upon property either real or personal, with the exception of the inheritance taxes and the license taxes first levied on railroads and latterly upon other public service corporations. The Constitution of the state, though not forbidding excise taxation, as determined in the inheritance tax case (Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. [N. S.] 121), contained only one brief section on the general subject of taxation, namely, section 1 of article 8, reading as follows: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe." Under this section property taxation has been the rule, with the exception just noted, until the passage of the present law. This law, however, is but the concrete embodiment of a popular sentiment which has been abroad for some time. The Legislatures of 1905 and 1907 (Laws 1907, c. 661) passed a resolution recommending the amendment of the section of the Constitution quoted by the addition of the following words: "Taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated, and progressive and reasonable exemptions may be provided." This change was ratified by the people at the general election held in November, 1908, and thus was clearly expressed by both Legislature and people the idea that some form of general taxation in addition to, or in place of, property taxation might well be adopted. The attempt has now been made to carry out this idea, and we have the result before us in the present law. With the political or economic policy or expediency of the law we have
102 nothing to do. If it be within constitutional lines, it represents and embodies public policy, because it is enacted by that branch of the government which determines public policy.

It may be well to note, however, that income taxation is no new and untried experiment in the field of taxation. It has been in use in various forms, and generally with the progressive feature, by many of the civilized governments of the world for decades, which in some instances run into centuries. It has been used at various times by nearly or quite 20 of our own states, and is now in use in several of them. It was used for a brief period by the government of the United States, and it — now in successful operation in practically all of the great nations of the civilized world, except the United States. The fundamental idea upon which its champions rest their argument in its favor is that taxation should logically be imposed according to ability to pay, rather than upon the mere possession of property, which for various reasons may produce no revenue to the owner.

It is argued that there should be as nearly as practicable equality of sacrifice among the various taxpayers, and that a tax levied at an uniform or proportional rate can rarely, if ever, produce equality of sacrifice; that 1 per cent. of a small income, which just suffices to support its owner, is a far larger relative contribution to the public treasury than 1 per cent. of an income so large that it cannot be exhausted by its owner, except by means of lavish and extravagant expenditures.

We are not to be understood by these remarks to be advancing arguments in support of the policy or expediency of the law, but simply as showing that in passing the law the Legislature is only adopting a scheme of taxation which has been approved for many years by many of the most enlightened governments of the world, and has the sanction of many thoughtful economists.

By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the Legislature has, in substance,
103 declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely: Taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value.

We pass from these general observations to consideration of the specific grounds of unconstitutionality alleged.

I. It is first claimed with much earnestness and ability that the act violates the provisions of the fourteenth amendment to the federal Constitution. One of the contentions under this head is that the progressive features of the act are discriminatory, if not absolutely confiscatory. Another contention is that the act provides for double taxation, and for both reasons it is claimed that it denies to citizens the "equal protection of the laws." It is said in support of this contention that the United States Supreme Court in the Pollock Case, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, has held that taxation of income derived from land is in fact taxation of the land itself, hence that the act provides for double taxation, first of the land in specie, and next of the income therefrom. It seems that this claim may be very easily met. The question in the Pollock Case was whether the taxation of rentals of land was direct taxation within the meaning of that term as used in the Constitution of the United States, and it was held to be the same, in substance, as a tax on the land itself, and hence a direct tax. This may be admitted for the purposes of the case, but it does not appear to in any way decide the question here at issue, or even to be very persuasive. The question there was of the power of Congress under that clause of the federal Constitution which forbids any direct federal tax, except one levied in proportion to the population. The question here is primarily of the power of the Legislature of Wisconsin under its Constitution to levy an income tax in addition to a real estate tax,

and, secondarily, whether such a tax denies to any one the equal protection of the laws.

The inapplicability of the rule of the Pollock Case to the case here presented seems so plain as to require little comment. There can be no doubt of the proposition that income taxation of a progressive character, in addition to taxation of property, is directly authorized by the Constitution of Wisconsin as amended in 1908. Words could hardly be plainer to express that idea than the words used. From them it clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the state Constitution. Both may be levied, and lawfully levied, because the Constitution says so. However philosophical the argument may be that taxation of rents received from property is in effect taxa-
104 tion of the property itself, the people of Wisconsin have said that "property" means one thing, and "income" means another; in other words, that income taxation is not property taxation, as the words are used in the Constitution of Wisconsin.

That they may say so and lawfully say so there is no doubt, unless some restriction in the federal Constitution is thereby violated, and we are pointed to none, save the clause guaranteeing "equal protection of the laws." That this clause does not apply to the case seems very well settled by the language of the Supreme Court of the United States itself in the great case of M. C. R. R. Co. v. Powers, 201 U. S. 245, at pages 292, 293, 26 Sup. Ct. 459, at page 462 (50 L. Ed. 744), where it is said: "There is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the circuit court in this case ([Michigan Railroad Tax Cases (C. C.) 138 Fed.] 232): 'There can at this time be no question, after the frequent and uniform expressions of the federal Supreme Court, that it was not designed by the fourteenth amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.'" This doctrine has been stated and restated in many forms, but with substantially the same meaning in many federal cases, beginning with the case of Bell's Gap R. Co. v. Pa., 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, nearly all of which are cited in the Powers Case at the close of the clauses above quoted. It seems unnecessary to quote or descant upon them. The sum and substance of it is that the fourteenth amendment never was intended to lay upon the states an unbending rule of equal taxation. The states may make exemptions, levy different rates upon different classes, tax such property as they choose, and make such deductions as they choose, and so long as they obey their own constitutions and proceed

within reasonable limits and general usage, there is no power to say them nay.

With regard to the progressive feature, it is aptly said in Knowlton v. Moore, 178 U. S. 41, at page 109, 20 Sup. Ct. 747, at page 774 (44 L. Ed. 969), by the present Chief Justice, that "taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative, not judicial." No more need be said as to the progressive feature. Expressly permitted as it is by our own Constitution, and clearly not within the inhibitions of the fourteenth amendment, the progressive feature is in no respect objectionable. It was suggested in the Knowlton Case, supra, that possibly the case might arise where exactions so arbitrary and confiscatory might be imposed under the guise of progressive taxation that the question would arise whether judicial power should not afford relief under inherent and fundamental principles of justice, but, as there is plainly no ground for such a contention here, there is no need of considering the question.

II. It is argued that the provisions which deny to non-residents the exemptions which are allowed to residents, and which allow the board of review to increase the assessment of a nonresident without notice, while requiring notice to be given to a resident, violate section 2 of article 4 of the federal Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The question as to the validity of the provision allowing exemptions to residents of the state and denying them to non-residents is raised, and receives some attention in the briefs, but was not mentioned in the oral arguments. We regard it as a question involved in considerable doubt, and one not necessary to be passed upon now.

It cannot be imagined for a moment that the Legislature would have failed to pass the act had it not contained this provision, and we prefer to wait until the question is presented in a concrete case, at which time there will be opportunity to fully consider it after comprehensive briefs and arguments. It seems that the Supreme Court of the United States decided in Ward v. Maryland, 12 Wall. 418, at page 430, 20 L. Ed. 449, that one of the privileges and immunities protected by the section quoted is the right "to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." Other decisions relied on upon the same side are In re Stanford's Estate, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, and Sprague v. Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840, and the cases cited in the latter case. On the other side reliance is placed on the analogy of the laws providing for exemptions from execution seizure, which confine their benefits to residents, and upon Ins. Co. v. Connecticut, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949.

So far as the provision allowing the increasing of an assessment against a non-resident without notice is concerned, this would
106 seem to be almost a necessity if power to increase the assessment of a non-resident is to be given to the board at all, otherwise the nonresident would only need to stay out of the state to prevent the possibility of an increase of his assessment. We do not consider that this latter provision affects in any way the privileges or immunities which are covered by the constitutional provision cited.

III. The claim is made that the law violates the constitutional guaranties of local self-government by placing the power of appointment of the various assessors of incomes in the State Tax Commission. These guaranties in substance are (1) that all county officers, except judicial officers, shall be chosen by the electors of the county every two years (Const. Wis. art. 6, § 4); (2) that all county officers whose election or appointment is not provided for by the Constitution itself shall be elected by the electors or appointed by the proper county authorities, as the Legislature shall direct; (3) that all city, town, and village officers, whose election or appointment is not provided for by the Constitution, shall be elected by the electors of the proper municipality or appointed by such municipal authorities as the Legislature shall designate; (4) that all other officers whose election or appointment is not provided for by the Constitution and all officers whose offices may thereafter be created by law shall be elected by the people, or appointed as the Legislature may direct. Const. Wis. art. 13, § 9. These provisions have been quite fully considered and expounded by this court in several cases, and it seems unnecessary to add to the quite complete discussions of the subject to be found in O'Connor v. Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831, and State ex rel. Gubbins v. Anson, 132 Wis. 461, 112 N. W. 475. It is sufficient to say that we do not regard the office of assessor of incomes, as provided for by this act, as either a county, city, town, or village office, nor do we regard it as an office existing in substance at the time of the adoption of the Constitution, or essential to the existence or efficiency of either of said municipal divisions of the state, but rather an entirely new office within the fourth class above named, whose election or appointment may be provided for in any way that the Legislature may in its discretion direct.

The further contention is made that it is a delegation of legislative power to vest in the State Tax Commission the power of appointing assessors of incomes and fixing their salaries. This objection is met and fully answered in State ex rel. Gubbins v. Anson, supra, and in Revisor's Case, 141 Wis. 592, 124 N. W. 670.

IV. A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them
to partnerships is unjust discrimination. The question de-
107 pends, of course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain

distinct and well-known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish. Further than this, however, there is another consideration. If the partner have individual income from other sources than the partnership business (as many do), his exemptions will be allowed to him out of the individual income, and thus, if he were also allowed exemptions from the partnership income, he would be allowed double exemptions. Altogether there seems to be ample reason for the classification. The exemptions themselves do not seem to be seriously attacked, nor do we see any reason why they should be. The most striking exemption is that of life insurance to the amount of $10,000 in favor of one legally dependent on the deceased, but, while this is somewhat large, we cannot say that it is unreasonable, nor that there is not ample ground for classifying legally dependent persons, and extending an exemption to them which is denied to others.

Attack is made upon the provision which directs that a taxpayer who has paid a personal property tax for the year shall be entitled to have the amount so paid credited upon his income tax. There is said to be no just ground for this distinction, but it seems quite clear to us that there is. In fact, it seems to be rather a means of equalizing the burden of the new form of taxation than to be really an exemption. It was evidently done with the idea of accomplishing, without too violent a shock to taxing machinery, the substantial elimination of personal property taxation, and the substitution thereof of "ability" taxation. The practical result is that both the taxpayer who has taxable personal property and the taxpayer who has none pay taxes according to his ability as evidenced by his income.

In this connection, though not perhaps in its logical order, may be considered the objection to that provision of the act which directs that the estimated rental of residence property occupied by the owner shall be considered as income. It is said that this is not income, and that calling it income does not make it income. It may be conceded that things which are not in fact income cannot be made such by mere legislative fiat, yet it must also be conceded, we think, that income in its general sense need not necessarily be money. Clearly it must be money or that which is convertible into money.
108 The Century Dictionary defines it as that which "comes in to a person as payment for labor or services rendered or some office, or as gain from lands, business, the investment of capital," etc. The clause was doubtless inserted in an effort to equalize the situation of two men each possessed of a house of equal rental value, one of whom rents his house to a tenant, while the other occupies his house himself. Under the clause in question, the two men with like property are placed upon an equal footing, and in no other way apparently can that be done. Under the English income tax laws it has been held that where a man has a residence or right of residence which he can turn into money if he chooses, and he occupies the residence himself, the annual value of the rental forms part of

his income. Corke v. Fry, 32 Scottish Law Rep. 341. We discover no objection to the provision in question.

Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of children under 18 years of age living with their parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there clearly is such a difference in this: That experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or parent and child make possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestionably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately.

One further objection we overrule here without comment, for the reason that it seems very unsubstantial, namely, the objection that the law is retroactive and void, because assessed on incomes received during the entire year 1911, while it did not go into effect until July 15th of that year, and also because it includes profits derived from the sale of property purchased at any time within three years previously.

V. A strong argument is made attacking the validity of section 1087a22, which provides, in substance, that the income of a resident derived from different political subdivisions of the state shall be combined for the purpose of determining the exemptions and the rate, while the income of a nonresident is to be separately assessed and taxed in each of the municipalities from which it is derived. A table is submitted showing that under this rule if A., a resident, derived $1,000 from each of 13 different towns or cities, he will be required to pay a tax of $367, because his income is aggregated, and consequently becomes in large part subject to the higher rates, while if B., a nonresident, receives the same income from the same sources, he will only pay the smallest rate, i. e. 1 per cent. of each $1,000, amounting to only $130. This, it is said, is unjust discrimination against the residents of the state, and deprives them of the privileges and immunities which are granted to the citizens of other states in violation of the federal Constitution. This presents the question whether such a discrimination can be made between residents and nonresidents, only this time the discrimination seems to be against the resident and in favor of the nonresident. This question, also, we deem one not necessary to be decided now, and we intimate no opinion upon it. It does not seem that the case will frequently arise, but, if it does, it can be then treated. We do not regard it as in any respect important in considering the validity of the act as a whole.

VI. Much complaint is made of that part of section 1087a6 which provides a different rate of taxation for the income of corporations from the rate prescribed for individuals, and this also is said to

be unjust discrimination. Again, the question is whether there be substantial differences of situation between individuals and corporations which suggest and justify this difference in treatment, and again it seems that the answer must be, "Yes." The corporation is an artificial creation of the state endowed with franchises and privileges of many kinds which the individual has not. It might be said with truth that the clause could be justified on the ground that it is an amendment to every corporate charter, which the Legislature has the undoubted right to make, but it is not necessary to rely on that proposition. The corporate privileges, which are exclusively held by corporations, and the real differences between the situation of a corporation and an individual, among which may be mentioned the fact that the corporation never is obliged to pay an inheritance tax, plainly justify a difference of treatment in the levying of the income tax. Were the income tax a tax upon property, there could be no difference in rate, for taxation of property must still be on a uniform rule, but, as has been heretofore noted, it is not a tax upon property within the meaning of our Constitution.

VII. The minor objections that the law in terms includes all corporations and does not specifically except national banks, nor name the officers whose salaries cannot be constitutionally taxed, are very easily disposed of. If national banks or any public officers cannot constitutionally be subjected to the tax, the law will be construed as not applying in such cases, just as section 1770*b*, although in general terms covering all business, has been held not to apply to interstate business.

110 VIII. We come now to certain serious objections which are made to the provisions of sections 1087*m*2, 1087*m*3, and 1087*m*3*b*. The first of these sections provides, in substance, that a resident shall be taxed upon all of his income arising from rentals, stocks, bonds, securities, or evidences of debt, whether the same be derived from sources within or without the state, but that the nonresident shall only be taxed on income derived from sources within the state, or within its jurisdiction, but that any person doing business both within and without the state shall, as respects that part of his income not derived from rentals, stocks, bonds, and securities, be taxed only on that portion thereof which is derived from business transacted and property located within the state to be determined in the manner specified in subdivision "*c*" of section 1770*b*, Stats., as far as applicable. The general purpose of the section is quite evident, namely, to tax a resident upon his whole income, and a nonresident only upon his income plainly derived from sources within the territorial jurisdiction of the state, and to provide that, where either person is engaged in a business interstate in its character, he shall only be taxed on that portion of the income derived from business transacted and property located within the state, according to the rule prescribed in section 1770*b* for determining that proportion of capital stock of a foreign corporation doing business in this state, which must be reported to the Secretary of State. The rule so imported into the statute is an arbitrary rule, and need not be stated at

length in the view we now take of our duty with regard to this contention.

Two fundamental objections are made to this section: First, that the state cannot tax the incomes of nonresidents, no matter from what source derived; and, second, that the attempt to tax a part of the profits derived from an interstate business, under the rule adopted, must necessarily result in a taxation of the receipts of interstate commerce, and hence a regulation thereof, which is in violation of that clause of the federal Constitution which gives to Congress the power to regulate commerce between the states.

We shall decide neither of these questions now. If the section be open to either or both of these objections, or any others, we cannot regard that fact as fatal to the act. The Legislature evidently intended to avoid both of the objections made. They had a difficult and delicate subject to deal with. Had they been authoritatively informed that they could not constitutionally tax a nonresident's income at all, and could not divide the income derived partially from state and partially from interstate business, we have no idea that they would on that account have abandoned their purpose to pass the law.

Again, if they provided an improper rule for the division
111 (conceding that a division can be made at all), there seems no reason why the rule may not be rejected and the proper rule, which will carry out the fundamental purpose of the provision, be used. In any event, we are fully satisfied that the rejection of any or all of the provisions objected to in this section cannot reasonably be held to invalidate the whole act.

When these questions are presented to us in a case actually arising, we shall be able to give them far more critical examination in the light of arguments and briefs directed exclusively to them. For the present, therefore, we leave the various objections to the validity of those parts of this section which are attacked without answer.

For the same reasons we decline at the present time to pass upon the objections to the second section referred to under this head. That section provides generally that a proportion of the interest on corporate bonds (to be ascertained in the same manner as the proportionate taxable income is ascertained in the preceding section) shall be taxed against the bondholders and paid by the corporation, and deducted from the next interest payment on the bond. Many serious objections on behalf of foreign bondholders are made to this provision from the fundamental objection that there is no power to levy such a tax at all, to the minor objection that the rule for ascertaining the proportion is incorrect. As we do not deem it necessary to pass upon any of these objections, we need not make particular statement concerning them now. The subject will be entirely open for discussion when an actual case arises necessitating a decision upon this section.

We have reviewed all of the objections made to the law which we deem of sufficient importance to require specific mention or treatment. As a whole, we regard the law constitutional. If there be provisions which will not stand the test, they are not provisions of such a nature that they must be considered as the inducement to or

as the compensation for the balance of the law. They may drop out, and leave the law intact in its fundamental and essential features.

As to the Winding Case commenced in the circuit court, a few words should be said. This was an action brought by a number of persons and corporations who alleged that they were taxpayers, and that they and their fellow taxpayers would be unlawfully taxed, and compelled to pay large sums under the alleged unconstitutional law, thus causing a multiplicity of suits; and praying that the officers of the state be enjoined from executing the law, and from paying any moneys out of the public treasury in its execution.

112 This seems to be a taxpayers' action pure and simple, brought in the circuit court to stay the hands of state officers from paying moneys out of the state treasury. We have already held in this opinion that no taxpayer's action can be maintained in the Supreme Court against the auditing or disbursing officers of the state. If such relief is sought, it must be in an action by the state itself, either brought by the Attorney General, or, in case of his refusal, by authority of the court itself, upon the relation of a private citizen. It would seem, a fortiori, that no taxpayer's action should be entertained in the circuit court, where the purpose is to halt the auditing and disbursing officers of the state. We regard this as the better administration. It is enough that this court has the power to authorize such an action if the exigency demands. To divide up that power and scatter it among the trial courts of the state, and allow every such court to judge of the exigency, might well lead to the bringing of many improvident actions. It is fitting that such an extreme power be vested in this court alone.

The result is that in the Bolens action the demurrer to the complaint must be sustained upon the merits, and judgment ordered dismissing the complaint without costs, in the Winding Case the order sustaining the demurrers must be affirmed, and the action remanded, with directions to dismiss the complaint for lack of jurisdiction.

By the COURT: It is so ordered.

Barnes, J., & Kerwin, J., took no part in the decision of the question of jurisdiction.

113 STATE OF WISCONSIN ex rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

MARSHALL, *J.*:

I concur in the decision and in the stated general character of this court's original jurisdiction, viz.: that it is wholly of a prerogative character, to be exercised in the name of the sovereign,—the state, standing for the people as an entirety.

I concur that prerogative judicial jurisdiction under the Constitution is reserved wholly to this court, and that an ordinary taxpayer's action to vindicate private rights is entirely outside of that field.

I do not concur in the view that the circuit courts have no jurisdiction of taxpayer's actions to enjoin illegal disbursements or waste of state money under the guise of an unconstitutional legislative enactment. The jurisdiction of such circuit courts is as boundless under the Constitution, as to all ordinary matters, as can be the violations of legal or equitable rights. It was lodged there by the people in the beginning. It cannot be given, taken away, or modified, legitimately, by any fiat of this court or in any way except in the manner pointed out in the fundamental law without invading the field of usurpation.

The historical treatment of this court's administration of its original jurisdiction is not to be taken, I apprehend, as intended
114 to indicate that its power is fenced about by mere precedents, or at all, except by the broad prerogative purposes of the grant. So far as the classification of precedents illustrates the general nature of the jurisdiction respecting what is and what is not within the field of prerogative purpose, it is very valuable but should be regarded, I think, in that light only. Any situation calling for remedial activity which falls within the prerogative field falls within the original jurisdiction of this court, regardless of whether there is any precedent to fit the case; but whether such jurisdiction should be exercised or not in any given case must necessarily rest, more or less, in judicial discretion.

I do not concur in the restrictive character of the decision. I think the Court should meet now and decide now, plainly and permanently, each of the important questions discussed by counsel, which, obviously, must be decided by this court sooner or later, and the earlier the better for all concerned. Any delay I think should be avoided, if possible, thus obviating the occurrence of a period of uncertainty, characterized by expensive litigation and business disturbance attributable to failure by this court to grapple now, after the full argument had, efficiently with the matters referred to. Judicial progress along that line is the correct judicial policy. It is wholly within the court's power to so progress. It is the need of the times. The whole people of the state, as it were, are before this court in this case invoking it to make a full decision. It is due to them to respond as effectually as practicable.

At some future time I will substitute for this brief memorandum an opinion in support of the suggestions made.

115 STATE OF WISCONSIN,
In Supreme Court:

Income Tax Cases.

TIMLIN, J. (dissenting in part): Chapter 658, Laws of 1911, relating to the taxation of incomes and making an appropriation for salaries of officers and other expenses of executing and administering the statute, was enacted by the Legislature, approved by the Governor, and published July 15, 1911. The act went into effect as law from an- after its passage and publication and officers were

appointed to administer this law, but no assessment or levy of tax had been made, and the time for enforcing the provisions of this act had not arrived when these suits were begun. I shall consider these suits separately, taking up first that begun in the circuit court by Arthur Winding and F. W. Gezelschap individually and as co-partners, the Wisconsin Trust Company, a corporation, several other natural persons, a national bank, and the Milwaukee Gas & Coke Company, a corporation. These plaintiffs evidently selected because of diversity of relations to the act in question affected differently by different sections of the act, but all desirous of escaping payment of the tax, hence interested in the question of the
116 constitutionality of the statute, join in a taxpayer's suit in their own behalf and in behalf of all the other income taxpayers of the state against three members of the State Tax Commission, the Secretary of State, and the State Treasurer. The cause of action alleged is that the act above referred to is null and void because in violation of the Constitution of the state of Wisconsin and of the Constitution of the United States and that the members of the State Tax Commission, will unless restrained by injunction through their subordinate appointees acting under said statute, exact and collect large sums of money from many residents and citizens of Wisconsin which collections will lead to a multiplicity of suits to recover back the moneys so collected or to a multiplicity of suits by the state to collect the fines and penalties provided in and by said act to be enforced against those persons who refuse to comply with the act. On these grounds they pray for an injunction restraining the State Tax Commissioners and their subordinate administrative officers from attempting to enforce the act and restraining the Secretary of State, who is by the state Constitution auditor, from auditing, and the State Treasurer, who is also a constitutional officer, from paying salaries, bills or expenses of any kind incurred under or payable by the terms of the act in question. This act carries in it a legislative appropriation for such purpose. This is therefore a bill by taxpayers to enjoin the enforcement of a statute levying taxes upon incomes on the ground that the statute is unconstitutional, which bill is sought to be upheld upon the equitable ground that it takes the place of a multiplicity of suits or actions, but, so far as the Secretary of State and the State Treasurer are concerned, it is a bill to restrain the payment of moneys out of the state treasury for the purpose of administering or enforcing a law claimed to be invalid. As to the latter defendants who have no part in executing or enforcing the act except auditing and paying bills, salaries and expenses under the legislative appropriation, the bill is maintainable only upon the ground that each individual taxpayer in the state has a proprietary interest cognizable in equity in the funds of the state treasury in analogy to the shareholder in a private corporation or the taxpayer in a municipal corporation. Land Log & L. Co. v. McIntyre, 100 Wis. 245, 256 op. and cases (75 N. W. 964, 69 Am. St. Rep. 915).

The circuit court sustained a demurrer to this complaint, and from that order the plaintiffs appealed to this court. This demurrer

went expressly to the point that the circuit court had no jurisdiction of the action, and also to the point that the complaint did not state facts sufficient to constitute a cause of action; so that both these questions are before us on this appeal. Generally speaking, the
117 law does not give a private remedy for the redress of a public wrong. One damaged or threatened by an unlawful act which affected him only as it affected that section of the public holding the same legal relation to such act could not at common law or in equity maintain an action against the doer of such act. And it mattered not that his damages were greater. If they were of the same nature, and differed only in degree, the wrong was still a public wrong. The rule has been applied in a great variety of cases in this court. Enos v. Hamilton, 27 Wis. 256; Cohn v. Wausau Boom Co., 47 Wis. 314, 2 N. W. 546; Baier v. Schermerhorn, 96 Wis. 372, 71 N. W. 600; Stedman v. Berlin, 97 Wis. 505, 73 N. W. 57; Liermann v. Milwaukee, 132 Wis. 628, 113 N. W. 65, 13 L. R. A. (N. S.) 253; Linden Land Co. v. Milwaukee, etc., Co., 107 Wis. 493, 83 N. W. 851; Pedrick v. Ripon, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269; Bell v. Platteville, 71 Wis. 139, 36 N. W. 831; Stone v. Oconomowoc, 71 Wis. 155, 36 N. W. 829; Gilkey v. Merrill, 67 Wis. 459, 30 N. W. 733, and cases cited; Sage v. Fifield, 68 Wis. 546, 32 N. W. 629; Harley v. Lindemann, 129 Wis. 514, 109 N. W. 570, 8 L. R. A. (N. S.) 124; Foster v. Rowe, 132 Wis. 268, 111 N. W. 688; Carstens v. Fond du Lac, 137 Wis. 465, 119 N. W. 117; Nast v. Eden, 89 Wis. 610, 62 N. W. 409.

It has been sometimes said by law writers and courts that this rule rested upon the consideration that, if one suit could be maintained in such case, each person affected might also bring suit, and thus the defendant be ruined by litigation. This consideration has special significance and force in a state where the law permits suits to be brought by private persons against administrative officers charged with the duty of enforcing the law. Few officers would attempt an efficient administration at such risk, and the ultimate result must be either injustice or inefficiency. But there is another reason for the rule which lies deeper and upon a broader foundation of governmental policy. That is the policy which places the prosecution of public wrongs in the hands of the public prosecutors and out of the hands of those who may be actuated by private revenge or gain, malice, or political intrigue. Biemel v. State, 71 Wis. 444, 37 N. W. 244. If the state as a sovereign is to have its proper and lawful recognition in our jurisprudence, it is, in the absence of statute, subject to no defense of laches, no limitation of time, and no liability to suit, and it must also be regarded as the repository of governmental policy and political discretion. When and how it will assert and enforce its sovereign prerogatives is often a political question, a matter of state policy, and to leave these great questions in the hands of every private litigant has a tendency to create confusion in jurisprudence, lack of wisdom in state policy, and contempt for authority.
118 In the great case of Attorney General v. Railroad Companies, 35 Wis. 425, Chief Justice Ryan said at page 529:

"Relief against public wrong is confined to informations by the Attorney General." See further for illustration Saylor v. Pennsylvania C. Co., 183 Pa. 167, 38 Atl. 598, 63 Am. St. Rep. 749. The victim of robbery, battery or arson may have a private action for damages against the wrongdoer, suspended according to some authorities until the pending public or state prosecution is at an end, and not concluded by the result of the public prosecution. But there *there* is coincident and cotemporaneous with the public wrong a private wrong suffered by the victim distinct and different from that suffered by any other member of the public. Where all are affected alike by the wrongful act, the language of the cases and many of the actual adjudications indicate that there is no private actionable wrong, not merely a lack of remedy. Cases infra and supra. An exception to these general rules was recognized in the case of taxpayers, first in this state I think, in Peck v. School District, 21 Wis. 516, and this doctrine received the approval of the Supreme Court of the United States in Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070. Since then the scope of the taxpayer's action so-called has been greatly extended by this court, and its decisions have not always been consistent.

In Peck v. School District, supra, the action was brought by certain taxpayers whose personal property had been levied upon and advertised for sale to restrain local administrative officers from action taken contrary to statute and consequently outside of their jurisdiction to the private injury of plaintiffs. Their remedy for this conceded private wrong would ordinarily be at law. But the contract which formed the basis for the tax was found to be fraudulent, thus arousing the jurisdiction of equity and the injunction against the enforcement of the tax sustained upon the ground that, the jurisdiction of equity having once rightfully attached, it should be made effectual for the purposes of complete relief. The decision of the court was written by Chief Justice Dixon. When the question was presented about four years later in a suit by taxpayers involving no recognized ground of equity jurisdiction, but showing the plaintiffs to be taxpayers threatened with the enforcement of an illegal tax precisely as it is presented by the complaint in the instant case except that there it was averred the local administrative officers acted without their statutory jurisdiction, while here it is averred that the Legislature of the state acted without its consitutional jurisdiction, the same distinguished jurist, denying the injunction, said among other things: "The general principle that equity possesses
no power to revise, control or direct the action of public polit-
119 ical or executive officers or bodies is, of course, well understood. It never does so at the suit of a private person, except as incidental and subsidiary to the protection of some private right or the prevention of some private wrong, and then only when the case falls within some acknowledged and well-defined head of equity jurisprudence. It is upon this principle that bills to restrain the collection of a tax have in general been dismissed [citing cases]. But there are other reasons why equity will refuse its aid

in a case like this, and which are most ably pointed out in the opinions in Doolittle v. Supervisors, 18 N. Y. 155, and in Sparlhawk v. Railway Co., 54 Pa. 401. The grounds are too remote, intangible and uncertain and the public inconvenience which would ensue from the exercise of the jurisdiction would be enormous. It would lie in the power of every taxpayer to arrest all proceedings on the part of the public officers and political bodies in the discharge of their official duties and assuming to be the champion of the community to challenge them in its behalf to meet him in the courts of justice to defend and establish the correctness of their proposed official acts before proceeding to the performance of them. A pretense more inconsistent with the due execution of public trusts and the performance of official duties could hardly be imagined." Judd v. Fox Lake, 28 Wis. 583. This case has been cited and followed many times: In Gilkey v. Merrill, 67 Wis. 459, 30 N. W. 733, wherein it was expressly adjudicated that an action will not lie in behalf of a taxpayer to set aside the taxes of a city or other municipality generally, Judd v. Fox Lake is cited to support the rule that there must be some distinct principle of equity jurisprudence under which the case is brought other than the mere illegality of the general taxes and its necessary and usual consequences. In Pedrick v. Ripon, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269, to the effect that the mere passage of a resolution and intent to enforce it are not sufficient to support a taxpayer's suit. In Sage v. Fifield, 68 Wis. 546, 32 N. W. 629, to the same effect. In Foster v. Rowe, 132 Wis. 268, 111 N. W. 688, to the effect that no action will lie by a taxpayer in his own behalf and in behalf of other taxpayers to restrain the levy and collection of the taxes of a municipality generally. See, also, Harley v. Lindemann, 129 Wis. 514, 109 N. W. 570, 8 L. R. A. (N. S.) 124. If the equitable ground of the prevention of a multiplicity of suits could be invoked to support such a taxpayer's action for the reason that the collection of an invalid tax will breed a multitude of suits at law to recover back the taxes or on the ground that it will require a multitude of suits or proceedings in the nature of suits by the state to collect the taxes, then manifestly the foregoing cases were incorrectly decided for all invalid tax levies give rise to suits to recover back the taxes,
120 and generally the nonpayment of taxes is followed by penalties of some kind. Such suits are also forbidden by the rule which prohibits the courts to entertain suits by a private citizen to vindicate a public right, or that which prohibits a court of equity form employing its preventive remedies so as to interfere in a wholesale way with the collection of the public revenues. But I think they were correctly decided upon either ground. See Bell v. Plattenville, 71 Wis. 139, 36 N. W. 831, and reasons there given for refusing to entertain the taxpayer's suit; Stone v. Oconomowoc, 71 Wis. 155, 36 N. W. 829; Harley v. Lindemann, 129 Wis. 514, 109 N. W. 570, 8 L. R. A. (N. S.) 124; Carstens v. Fond du Lac, 137 Wis. 465, 119 N. W. 117. In the latter case the right of a taxpayer to sue in behalf of other taxpayers is denied where the plaintiff merely seeks to relieve his property of a tax which he claims to be

void. In Giblin v. North Wis. L. Co., 131 Wis. 261, 111 N. W. 499, 120 Am. St. Rep. 1040, the cases are cited which hold that a decree in a taxpayer's suit is binding upon all the taxpayers and citizens of the municipality concerned in the litigation. The taxpayer's suit as both created and limited by judicial decisions in this state has been productive of very beneficial results in preventing municipal maladministration, conserving municipal funds and property, and keeping fraudulent or erring municipal officers within their jurisdiction. But the fact that it has cured some ills does not prove it a panacea. It has its limitations as above shown founded upon sound policy even with respect to subordinate municipal officers. For stronger reasons, those limitations must be applied when the suit is state wide in its operation, and is, in effect, a suit against the state to prevent the entire state levy and collection of a tax on the averment that the law sought to be enforced is unconstitutional. The state as such has immunity from actions except where expressly authorized by statute, and here no such statute exists covering the instant case. The state officers in the execution of a law have a wider latitude of discretion than municipal officers. Taxpayers' suits against the latter are brought to vindicate some law, here to annul a statute. The taxpayer here attempts to represent a larger constituency, and the arrest by injunction of all the taxes of the state surely implies a wider scope of power, larger interference with administrative officers and multiplication of the serious consequences mentioned in the quotation from Judd v. Fox Lake, supra.

It seems apparent that, under the decisions of this court, the first action cannot be supported as a taxpayer's action based upon the avoidance of a multiplicity of actions at law or suits in equity. The other ground averred in support of the complaint is, as said, based upon the claim that each taxpayer of the state has an equitable proprietary interest in the funds in the state treasury or an in-
121 terest of such a nature that equity will recognize it and protect it by injunction against the constitutional fiscal officers of the state to prevent them from paying out of such treasury funds for the execution or administration of an unconstitutional law under the rule applied to municipalities in Land Log & L. Co. v. McIntyre, 100 Wis. 245, at page 256 op., 75 N. W. 964, 69 Am. St. Rep. 915; Estate of Cole, 102 Wis. 1, 78 N. W. 402, 72 Am. St. Rep. 854, and other cases in this court. But the situations are not analogous. The state is not to be put upon the level of a private or of a municipal corporation. The former is the sovereign; the latter the subjects. The courts have jurisdiction in an action against a municipality as against a natural person. They have no jurisdiction of actions against the state except with the consent of the state expressed by the legislative branch of the government and approved by the executive. Unlike the federal Constitution and the Constitutions of most of the states, the Constitution of this state creates and recognizes, not three, but four, branches of government—legislative, executive, administrative, and judicial. Administration is logically, and in most cases legally recognized as, an exercise of the executive power. The heads of the great administrative departments of the United

States government derive their power from the grant of executive power in the federal Constitution, and their lawful acts are treated as acts of the chief executive, and in some instances an injunction against them to prevent the enforcement of law challenged as unconstitutional was put upon the same level as a like injunction against the President. Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721, and cases in Rose's Notes. The administrative officers named in article 6 of our state Constitution are Secretary of State, Treasurer, and Attorney General for the state, and sheriffs, coroners, registers of deeds, and district attorneys for the counties. Among the duties of the Secretary of State prescribed by the Constitution is that "he shall be ex officio State Auditor." There is no general grant of the whole administrative power to any one of or to all these officers, and doubtless this and section 4 of article 5, which requires of the Governor that "he shall expedite all such measures as may be resolved upon by the Legislature and shall take care that the laws be faithfully executed," is sufficient authority for the Legislature to impose upon the Governor and upon subordinate administrative officers like the state Tax Commissioners all necessary administrative powers not by the Constitution vested in the administrative officers therein mentioned. There is also found in our state Constitution some express limitations upon the power of the Legislature over the funds in the state treasury and some restrictions of that power by necessary implication.

122 Instance section 18 of article I, which provides that no money shall be drawn from the treasury for the benefit of religious societies or religious or theological seminaries; also section 2, art. 8, which forbids an appropriation for the payment of any claim (except claims of the United States and judgments) not filed within six years after the claim accrued; and there are others. State v. Davidson, 114 Wis. 563, op. of Dodge, J., at page 580, 88 N. W. 596, 90 N. W. 1067, 58 L. R. A. 739. There are restrictions by necessary implication as section 1, art. 10, which provides that the compensation of the superintendent of public instruction shall not exceed the sum of $1,200 annually. State v. Cunningham, 82 Wis. 39, 50, 51 N. W. 1133. But these only accentuate the application to all other treasury disbursements of the rule fundamental in popular representative governments that the popular branch of the state Legislature or the legislative branch of the government shall control the public purse. "Expressio unius est exclusio alterius." In no system is the judiciary the guardian of the public treasury except as the Constitution by restrictions upon legislative power in this direction may have so provided that a judicial controversy not involving political discretion may arise. The manner in which appropriations of money must be made is regulated and there is a general provision, recognizing the authority of the legislative branch of the government over the public funds, to the effect that no money shall be paid out of the treasury except in pursuance of an appropriation made by law. There is in the instant case an appropriation made by law, but it is contended that this appropriation, being made for the purpose of administering or carrying

into effect an unconstitutional law, is itself unconstitutional. What provision of the Constitution does it conflict with if we suppose the premises correct? The state legislature is not expected to find a grant of power to it in the state Constitution. Where there is no restriction, it possesses the power. Commonwealth v. Plaistead, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566. There is no such restriction upon the power of the Legislature over the public funds. On the contrary, it may well be within the duty, at least it is within the discretion, of the Legislature that all laws, even invalid laws, be enforced, and thus brought to the test before the courts in the ancient well-understood and lawful way. But, in any event, the courts have no authority to interfere by injunction, and thus forestall attempts to enforce the law. This because the taxpayer has no interest in the funds in the public treasury to restrain these officers, and because the court has no power to create such an interest in the taxpayer, and because the court does not possess the power where no constitutional interdict intervenes to control the
123 disbursements of public funds as against the legislative branch of the government. But of this hereafter.

It further seems to me obvious that a suit by a taxpayer against such fiscal officers of the state based upon the claim that a statute is unconstitutional is a suit by a private person against the state not going upon any apprehended destruction or confiscation of his property or clouding his title, as we say in legal phrase not quia timet, but ostensibly as champion of the public interests and in self-assumed protection of public funds, and really to avoid payment of the tax by arresting the power of the state in its attempt to execute the law by furnishing the funds for that purpose. That this is a suit against the state is settled by authority here and elsewhere. It falls within the rule of State v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, sixth paragraph of opinion and the cases there selected for approval. Stephens v. Railway Co., 100 Tex. 177, 97 S. W. 309, Lord v. Board of Agriculture, 141 N. C. 135, 15 S. E. 1032, State v. Burke, 33 La. Ann. 498, Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, and cases in Rose's Notes, and Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, are in point and other cases can be found. Quoting from the last cited case: "If because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the Legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." See, also, Ex parte

Young, 209 U. S. 157, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, et seq. op.

But there emerges here what is perhaps a larger question. To say that the courts have jurisdiction to review statutes at the suit of any taxpayer of the state who seeks to enjoin the payment of moneys out of the state treasury for the administration or enforcement of those statutes is to establish a general revisory jurisdiction in the courts over all legislation before any actual judicial or justiciable controversy has otherwise arisen. I may safely say that no statute is received with unanimous approval. A taxpayer may always be found.

It is no answer to say that the court has a discretion as to
124 when it will recognize this right of the taxpayer or issue its injunction. That only changes the principle which it is sought to ingraft upon our form of government to the extent that we are to modify the statement of it by saying: "The courts have the power in their discretion to review all legislation," etc. To my mind it is an obvious fallacy to say that this power or this discretion extends only to the review of unconstitutional statutes. As well might one say that courts had jurisdiction to try only guilty persons charged with crime. The inquiry proposed is whether or not the act in question is unconstitutional, and it is to entertain such inquiry and decide it for or against the validity of the statute that the jurisdiction exists if it exist at all. To recognize a power resident in the courts by which that branch of the government could supervise legislation in this way would be to create a radical change in our plan of government as heretofore understood. This must be quite apparent to those who have extended their legal studies beyond the minutiæ of adjudged cases and the rules of private right and have acquired some knowledge of the principles of government. All revenue measures and most other statutes involve some charge upon the public treasury for their administration. All acts of the Legislature involve the expenditure from the state treasury of at least printing and publishing. Therefore all statutes would at this preliminary stage be subject to judicial review. In reply to a suggestion of this kind from the bench, one of the learned counsel for plaintiffs suggested that this expense was so small that a suit would not be entertained because de minimis non curat lex. But this answer overlooked the cases of Mueller v. Eau Claire, 108 Wis. 304, 84 N. W. 430, and Chippewa Bridge Co. v. Durand, 122 Wis. 85, 108 op., 99 N. W. 603, 106 Am. St. Rep. 931, wherein it was held that the court will not inquire into the amount or extent of the taxpayer's interest so long as he is a taxpayer. Besides, it overlooked the consideration that in a republic founded upon the equality of its citizens before the law it would be quite inconsistent with fundamentals to rest the jurisdiction to review legislative acts at this preliminary stage of their existence upon the wealth of the taxpayer who comes in to represent himself and the public. Nor can the amount of the charge which the law imposes on the state treasury affect this question which is one of jurisdiction. No statute gives the taxpayer an interest in the funds in the state treasury. The courts must invent that species of property right if it is to have recognition in the courts. The courts also have considerable discretion in granting or withholding injunc-

tions. This inevitably leads to the conclusion that the court is asked to create or recognize a right not given by common law or statute, and then exercise its discretion to issue an injunction to prevent threatened invasion of this right and all for the purpose of making an occasion or an opportunity to review the constitutionality
125 of a statute at the preliminary stage of its existence before its enforcement is attempted and before any controversy otherwise justiciable has arisen. To do so would conflict with the notion of constitutional law and the powers of the judicial branch of the government with reference to declaring laws unconstitutional announced in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, and many cases since. It has been said that a court never declares a statute unconstitutional, but being confronted with a judicial question which it may not evade, and with a Constitution which commands one thing and a statute which commands the opposite, they reluctantly and unavoidably obey the paramount not the subordinate command. The result of the grave duty thus forced upon the court is unconstitutionality of the statute because it is incapable of enforcement in the courts which speak last. But here we are asked, not only to compare the statute with the Constitution, but to make the occasion for so doing and to hold for the purpose of enabling us to do so by legislation, legal fiction or unprecedented judicial decision that every taxpayer has a proprietary interest in the funds in the state treasury. The controversy at this stage concerning the constitutionality of a statute is the same which was or might have been presented to the judiciary committees of the Legislature or to the Legislature in session the same as that waged before the Governor to induce him to veto the act. It is in the nature of an appeal from the legislative and executive branches of the government to the judicial.

"The theory upon which, apparently, this suit was brought is that parties have an appeal from the Legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by any one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the Legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the Legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." Chicago, etc., Ry. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176. See, also, Charles River Bridge v. Warren, 11 Pet. 420, 9 L. Ed. 773; Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721; Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437. An injunction
126 will not issue to restrain the execution of an unconstitutional law merely on the ground that it is unconstitutional.

Thompson v. Commissioners, 2 Abb. Prac. (N. Y.) 248; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37; People ex rel. Alexander v. District Court, 29 Colo. 182, 68 Pac. 242. I am convinced that the decision below was correct, and should be affirmed.

In the second suit a private citizen who is also a taxpayer seeks as relator to begin in this court an action by and in the name of the state against the Secretary of State and State Treasurer for the purpose of enjoining them from paying out funds from the state treasury for salaries and other expenses of administering this law, and also against the members of the State Tax Commission enjoining the latter from exercising the duties and powers conferred upon them by the act in question, all upon the ground that this act is unconstitutional. As against the Secretary of State and State Treasurer, the ostensible purpose of the bill is to protect the state treasury. As against the State Tax Commission the real purpose of relator to avoid paying income tax is disclosed. No steps have been taken to enforce the law, and the time for its enforcement has not arrived. Application was by relator made to the Attorney General to begin and prosecute this suit. That official refused, and the relator on this showing with the usual averments of irreparable injury, etc., seeks to arouse the original jurisdiction of this court to entertain the suit to put his private counsel in the place of the Attorney General to prosecute it, and to have the state at this stage of existence of the statute enjoin its own officers from collecting its own revenue upon the averments that the statute is unconstitutional. The constitutional grant of power to this court is that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate and justices of the peace." Article 7, § 2. "The Supreme Court, except in cases otherwise provided in this Constitution, shall have appellate jurisdiction only which shall be coextensive with the state. * * * The Supreme Court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs and to hear and determine the same." Article 7, § 3. That portion of the last above quoted section giving power to issue the writs mentioned and to hear and determine the same was construed to confer upon this court original jurisdiction of all judicial controversies within the scope of and instituted by the issuance of such writs at common law, but it was said that the court would only exercise the power thus granted in controversies affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. It was also decided that the writ of in-
127 junction found in this section associated with the so-called prerogative writs might also for this reason be employed to assert the prerogatives of sovereignty. Cases collected in Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27. Rules regulating the exercise of the original jurisdiction as distinguished from the appellate jurisdiction of this court, while appropriate and desirable to facilitate our work, are not fundamental. Power is derived from the Constitution not from such rules which only operate to regulate the manner of its exercise. They

merely serve to indicate when the parties litigant should approa
this court in the first instance, and when reach this court by appe
or writ of error. There is I think a marked inconsistency betwe
such cases as State v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, In
Hartung, 98 Wis. 140, 73 N. W. 988, and State v. Cary, 132 Wi
501, 112 N. W. 428, and other cases found in our reports and r
ferred to in the opinion written by Chief Justice Winslow herei
I am quite satisfied with the opinion of the court in this respect, b
fear it will meet the usual fate of mere judicial warnings, and i
again disregarded when a new exigency arises. The Constitutio
vests in this court only judicial power thus excluding by implic
tion political administrative and legislative power. The power t
institute a suit by and in the name of the state cannot logically b
said to be an exercise of judicial power. It is rather executive o
administrative. The Attorney General, district attorneys, the Gov
ernor and other officers possess this power, although they exercis
no judicial power. It is only by historical associations of the word
"judicial power" as distinguished from scientific definition that th
act of instituting a suit in court in the name of the state can b
called an exercise of judicial power. Assuming it to be settled by
precedent that the judicial power mentioned in our Constitution is
that power formerly exercised by the court of King's Bench and the
Chancery Courts in England, still that power fell short of authorizing
an attack by suit upon the acts of coordinate departments of gov-
ernment by any writ before any legal controversy had arisen by the
attempted execution of such acts. How, then, did this court acquire
jurisdiction to authorize the institution of and then to entertain such
a suit? Neither logical analysis of the terms "judicial power" nor
historical association warrants the exercise. The restriction of suits
against the state is quite impotent if every taxpayer of the state,
while he cannot make the state a defendant in his suit, may never-
theless make the state a plaintiff in a civil action against the same
state officers to fight his battle for him. If these state officers repre-
sent the state in an action against them to restrain them from en-
forcing the law, they occupy the same legal position, and
128 make the same claims when this form of making the state
plaintiff is complete. We can hardly say that the controversy
has become a suit by the state against the state for that would be
absurd. We cannot liken the state to a trustee seeking the advice
and direction of the court, for that presupposes a supervisory juris-
diction over the trust and in the court, and begs the question. We
cannot find an analogy in the governments of those states like Mas-
sachusetts, where the Governor or the Legislature may call upon
the court for an opinion in advance of enactment and of litigation
because there it is conceded that the courts in giving such opinions
act not in a judicial, but in a political capacity. Opinion of the
Justices, 126 Mass. 557, 566. Turn this as we will, we are always
confronted with the fact that, whether the taxpayer is plaintiff or the
state plaintiff, the suit involves a claim on the part of this court of
power to revise and review acts of the Legislature with reference to
their constitutionality before any judicial controversy has arisen

other than a controversy nursed into life and existence by this court for the purpose of such revision.

All that I have said and quoted with reference to the action in the name of the taxpayer on this point applies to this action. Of the two I would prefer the taxpayer's suit, because this is subject to the same weakness and also savors of subterfuge. Sovereignty is one and indivisible. But in the exercise of sovereign power all the great departments of government must concur. The manner of this concurrence is regulated by the division of governmental powers in the Constitution and the limitations placed upon each department arising from this division or from express or necessarily implied restrictions found in the organic law. This sometimes impairs efficiency, but it promotes liberty. The most promptly efficient government is a despotism. It is the wisdom of the spendthrift which sacrifices future advantage for immediate gratification. The statesmen who founded the American republics understood these things, and made deliberate choice between a government of liberty and one of temporary and prompt efficiency. The result thus far has justified their judgment. In the prevailing plan of government the guardianship of the funds in the public treasury, except when otherwise specially provided, is committed to the legislative branch of the government, which is responsible to the people. The judicial branch of the government is to take no part in political questions. In consummation of the exercise of the sovereign power, it is to act last, and to act only when aroused by an actual judicial controversy. Until it comes before the court incidentally in such controversy, the question of the constitutionality of a statute is a political, not a judicial, question.
129 There is therefore no jurisdiction resident in the courts as there is in the Legislature and the Governor to declare an act unconstitutional in advance of a judicial controversy which necessarily involves that question. The court, therefore, has no jurisdiction to create such controversy by authorizing what is to my mind a fictitious suit in behalf of the state against its own officers, where the ground for such a suit is that these officers are about to collect taxes under a general tax law. That is merely a statement of the rule that what cannot constitutionally be directly done cannot be done by indirection. The latter breaks down the American republican form of government as well as the former.

Examining from another viewpoint. In a case where a bounty was granted to manufacturers of sugar by Congress, and the disbursing officer of the treasury refused payment under the belief that the act of Congress was unconstitutional and the statute authorized a suit against the United States an actual justiciable controversy thus arose. But even here and under a Constitution carrying delegated power only the Supreme Court of the United States decided as set forth in the second paragraph of the syllabus: "It is within the constitutional power of Congress to determine whether claims against the public treasury are founded upon moral and honorable obligations and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decisions can rarely, if ever, be the sub-

ject of review by the judicial branch of the government." U. S. v Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215, approved in Allen v. Smith, 173 U. S. 389, 19 Sup. Ct. 446, 43 L. Ed. 741, cited in State v. Froehlich, 118 Wis. 143, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985. If we compare the instant case with the above, we will find that here no justiciable controversy has arisen, but the court is asked to make one by authorizing a suit in the name of the state upon the petition of a taxpayer, and that here we are asked to decide in such suit that the Legislature which possesses all power not forbidden had no power or discretion to make an appropriation of public moneys for the purpose of enforcing a statute passed by its Legislature and approved by its executive. I think this court has no jurisdiction so to do. For the court to decide before its judicial power is aroused by a legal controversy is to assume a jurisdiction not given to it by law. I think the assumption of such jurisdiction changes the form of government as heretofore established and understood, and therefore we are justified in disregarding or overruling precedents in this court which might by mere logical
130 inference seem to support this suit. I think we should have the courage to stop before taking this last step fraught with such consequences.

In this connection, I wish to mention the case of Rosenheim v. Frear, 138 Wis. 173, 119 N. W. 891, which was a motion for leave to bring suit in the name of the state. When that motion was presented, it will be remembered by those present that I protested vigorously from the bench against countenancing any such proceeding. I thought then, and I still think, that the suit there suggested was preposterous. If the Legislature of Wisconsin had not been a body of rather feeble temper, it might not be entirely discreet for judicial officers to assert the right to launch and determine such a suit. But the motion was denied, and I regret to say that I gave no careful attention to the language of the opinion denying the motion and neglected to dissent therefrom. I do not think either that the complaint states a cause of action in favor of the state and against its officers. The mere fact that taxes will be collected from a large number of its citizens by the state authorities for the state creates no actionable wrong against the state. All general laws affect all the people of the state, and all police regulations curtail their rights or liberties to some extent. But this gives no right of action to the state. Neither can a general tax law, be it ever so new. The notion that the state has a right of action to test such laws is, to say the least, very novel. Nor does the fact that a law which appears on its statute books and is about to be enforced at some expense upon the state treasury do so. It is the legal and constitutional way in which to handle a law whether that law be valid or invalid. It is the proper mode of getting that law before the courts. It merely amounts to saying that the officers of the state are about to enforce the state statutes in such manner as to create justiciable controversies which will thus come before the court in the ancient established and orderly way. Surely such attempt is not actionable. If the statute is valid, it is their duty to enforce it, and it is, in any event, their duty to

obey it until it is held to be invalid by the judicial branch of the government in a judicial controversy of which the latter branch has jurisdiction. If the Legislature has discretion to recognize merely moral obligations and appropriate money for their payment, it surely may appropriate money for enforcing even a void act, and thus bringing it to the judicial test in an actual controversy. It may be that in the march of progress and the evolution of governments the change in the plan of our government created or confirmed by the decision herein is inevitable. But I mistrust, and I think not through timidity, the steady progress of this court always in the direction of grasping more power. This will establish the
131 judiciary as a political branch of the government and displace it from that place of dignified impartiality which it has so long and so successfully filled. This extension of power is the progress which has always resulted in the wreck of human institutions. I have now made my protest against it in Re Revisor, 141 Wis. 592, 124 N. W. 670, in State v. Board of Canvassers, 145 Wis. 294, 130 N. W. 489, in Rosenhein v. Frear, supra, in Lawler v. Brennan, 134 N. W. 154, decided herewith and in the instant case, and so discharged what I conceive to be my duty. In any view of the case, even that taken in the majority opinion, it seems to me the second action should be dismissed for want of jurisdiction as against the Secretary of State and the State Treasurer. But I consider that this court has under the Constitution of this state no jurisdiction to review the statute at this stage of its existence and in this way in either case. The assumption of the jurisdiction so to do cannot be justified upon the comparative futility of such review demonstrated by the result in this case.

132 STATE OF WISCONSIN,
In Supreme Court:

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

Injunction.

And now comes the above named plaintiff and relator and moves said Supreme Court for a rehearing in the above entitled matter in which a decision was rendered on the 9th day of January, 1912.
Dated February 6th, 1912.

CARPENTER & POSS,
Attorneys for Plaintiff and Relator.

133 (Endorsements:) Original. The State of Wisconsin. In the Supreme Court. The State of Wisconsin upon the relation of Harry W. Bolens, plaintiff, vs. James A. Frear, et al., Defendants. Motion for rehearing. Service admitted this 7th day of February, 1912. L. H. Bancroft, Attorney General, Russell Jackson, Deputy Attorney General, Attorney for defendants. Filed Feb.

7, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Carpenter & Poss, Attorneys at Law, Wells Building, Milwaukee.

134 STATE OF WISCONSIN,
In Supreme Court:

STATE OF WISCONSIN *ex Rel.* HARRY W. BOLENS, Plaintiff in Error,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants in Error.

To the Honorable Levi H. Bancroft, Attorney General of the State of Wisconsin, and
The Honorable Russell Jackson, Deputy Attorney General of the State of Wisconsin, Attorneys for the above named defendants.

SIRS: You will please take notice that on the 27th day of February, A. D. 1912, the above named plaintiff and relator will file with the Clerk of the above named Court, and will submit to said Court their printed argument upon the motion for rehearing heretofore made in the above entitled matter, of which printed argument six (6) copies are herewith served upon you.

Yours respectfully,

CARPENTER & POSS,
Attorneys for Plaintiff and Relator.

Dated at Milwaukee, Wisconsin, this 17th day of February, A. D. 1912.

135 (Endorsements:) Original. The State of Wisconsin. In the Supreme Court. The State of Wisconsin upon the relation of Harry W. Bolens, plaintiff, vs. James A. Frear et al., Defendants. Due service of within notice and 6 copies of brief admitted this 17th day of February, 1912. Russell Jackson, Deputy Attorney General, Attorney for Defendants. Filed Feb. 27, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Carpenter & Poss, Attorneys at Law, Wells Building, Milwaukee.

136 And afterwards, to-wit: on the 12th day of March, A. D. 1912, the same being the seventeenth day of said term, the following proceedings were had in said Court:

STATE OF WISCONSIN ex Rel. HARRY W. BOLENS, Plaintiff,
vs.
JAMES A. FREAR, Secretary of State, et al., Defendants.

Injunction.

The court being now sufficiently advised of and concerning the motion of the said plaintiff for a re-hearing in this cause, it is now here ordered and adjudged by this court, that said motion be, and the same is hereby, denied without costs to either party.

137 And thereafter on the 15th day of March the following opinion of Justice Marshall was filed in words and figures following, that is to say:

138 State, 14.

No. 237, Aug. Cal., 1911.

STATE OF WISCONSIN,
In Supreme Court:

In re APPLICATION OF HARRY W. BOLENS, &c.

ARTHUR WINDING et al., Appellants,
vs.
JAMES A. FREAR et al., Respondents.

Filed Mar. 15, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

MARSHALL, *J.*: I fully determined to write, at length, in substitution for the above. On further reflection it seems to do so might give unwarranted dignity to some suggestions voiced in these cases which were, as is supposed, effectually foreclosed more than a century ago, and so are not, generally, and should not, efficiently, be deemed open for discussion.

After the uniform holding here, through many important adjudications, that public money in the public treasury, is a subject of trust for all the people for public purposes and disbursable only pursuant to valid legislation, and that every tax payer is a cestui que trust having sufficient interest in preventing abuse of the trust to be recognized in the field of this Court's prerogative jurisdiction as a relator in proceedings to set sovereign authority in motion by action in the name of the State for prevention or redress, any suggestions to the contrary, however well supported as an original proposition, might well have but a passing notice. The same is true of the question of whether an action against a state officer to prevent disbursement of public money in the enforcement of an invalid act
139 of the Legislature is against the state, in any proper sense.

It has been held over and over again, in terms or in effect, that such an action is to be regarded as against the person in his individual, not in his official capacity, and so not against the state,—so held very recently most significantly by the Supreme Court of the United States: In re Young, 209 U. S. 123, 28 Sup. Ct. 441, followed here in Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 85.

It is essential to strictly maintain here the foregoing stated principles. Only by so doing can this court fully perform its great function as the supreme efficient conservator, defender and preserver of the inherent and guaranteed rights of the people. The court will not swerve from the proper course for which it was given independent status, "through fear, favor, affection or hope of reward."

I know every member of it is firm in that. No unreasonable impatience elsewhere, if such exists, will be permitted to interfere with the sturdy performance of constitutional duty here. While paying due deference to co-ordinate departments it must expect that deference in return. There must be no hesitation through fear of censure or thought of tuning the judicial harpstrings to harmonize with temporary conditions, as we hear advocated outside at times. In that there is no division of sentiment here.

I have too much respect for the law-making power to indulge the idea that there is any dominating thought there hostile to the willing performance of duty here to test enactments by constitutional restraints on all proper occasions, and put the stamp of judicial disapproval thereon when manifestly required because of the enactment being evidently not law in fact though law in form; and too much respect for the average legislative sentiment not to see through the vista of momentary impatience, sometimes exhibited at the failure of legislative efforts, to the considerate judgment of after reflection which may always be depended upon to approve and
140 honor full performance of judicial duty to appreciate that when there is a conflict between an act and the Constitution, as seems to the Court created to view the matter, it must decide between them and "as the Constitution is superior to any ordinary act of the Legislature the Constitution and not the ordinary act must govern the case to which they both apply." Marbury v. Madison, 1 Cranch, 137. On the other hand, I have too high regard for the great trust reposed in the instrumentalities chosen for now to give vitality to the judicial function, to think that, if there be any considerable sentiment momentarily elsewhere inimical to full performance of duty here, it can exert efficient influence in that regard. Generally speaking, I apprehend the sentiment of the public is in favor of a prompt, thorough treatment of constitutional questions as they arise. The people want to know, and have a right to know and legislative instrumentalities desire to have them know, at the earliest practicable moment, just where they stand with reference to important new, far-reaching enactments.

The fundamental law, as it has been construed, and the function of this Court as to applying the rule of the Constitution to legislative enactments and using its prerogative power against any one assuming to act for the State who would otherwise interfere with guaranteed rights under the guise of an invalid enactment, must be maintained. No one can win enduring fame by failing to appreciate that and be ready to vigorously vindicate it.

The Court, with practical unanimity, reached the conclusion that all constitutional questions presented and argued in the cases, in some one of them, were within the Court's power to consider
141 and decide; but to what extent to respond was within its discretion. That left much to judicial propriety, convenience, exigency and expediency, resulting in the Court going only so far as was vital to the existence of the commission with power to enforce the dominating features of the law. Not to go that far was thought would be well nigh, if not quite, abuse of discretion; not doubting

competency to go further and decide all important questions so ably discussed. Obviously there is left a broad field for very much and very perplexing litigation, to the probable great prejudice of public and private welfare. The field so left untouched was as fully covered by eminent counsel as it is liable to ever be. The whole crop of legitimate controversies was fully ripe for the judicial harvest. All interests called loudly for the chosen instrumentality for the work to grapple with the proffered task. In my opinion, the waste of energy and expense attributable to failure to do so might well have been avoided. It was according to precedent to take the course adopted, I confess. But should precedent efficiently bar the wheels of progress toward a more full response to such an appeal for judicial determination? It seems not.

This Court can well view with satisfaction its progressive course as to meeting judicial controversies squarely, casting aside the ancient method of dilatory, fencing, mere piece meal decision, delaying the finality by technical dispositions, depleting to public and private resources and disappointing and exhausting to those resorting to the courts for redress and prevention of wrongs. There is room for further progress. Impatience with the law's delays sometimes significantly manifested, will disappear without any change in the law of procedure by changes of method within the province of the
142 court to make of its own motion, demonstrating that the fault supposed to exist is, in the main, in the administration of the law rather than in the law itself.

Seeming opportunity for worth-while progress is most inviting in cases like those before us. Where a new law which is questioned as to its meaning and its legitimacy in many important minor features as well as the dominant one,—a law of far reaching character, materially affecting the people generally and bristling with complications, each presenting, from some reasonable standpoint, serious difficulty, is brought early here for examination in all such aspects,—brought by the exercise of prerogative power so that all the people, as it were, are represented at the bar to the end that the enactment so far as valid, may be vigorously enforced and cheerfully submitted to, and the mischiefs ordinarily flowing from such a course for a time and the law then being found full of infirmities, may be avoided, why should not the earliest opportunity afforded be willingly taken to carry the whole mass of things to the consultation room and patiently and finally solve the uncertainties, thus promptly affording peace to the State and its people in respect to the matter? The power exists to do it. Universal acclaim is in favor thereof. We are here to vitalize the power entrusted to us to do it. We have time therefor. We are as able now for the task as we probably ever will be. If we have not had as efficient help as we are likely to have at any future time, the power is ample to call for and obtain further assistance from eminent advocates of opposing theories. Then why hesitate? Is there any good reason for it?

I cannot perceive any satisfactory answer in the affirmative
143 to the foregoing. Hesitation is largely from judicial custom to delay grappling with questions so long as possible, with

the thought that time will either render doing it unnecessary or decision may perhaps be later made under more favorable circumstances, and habit to minimize judicial labor where practicable without affecting the grade of it, to the end that each of the controversies brought here may have its due proportion of attention. I confess the Court's burdens are heavy and that the easiest way to escape from danger, if any exists, of which I must say I am not conscious, of its being unduly so, is by limiting decisions to actual necessities of cases as they arise. That was for a time given as sufficient justification for limiting activity of prerogative jurisdiction to a very narrow field and limiting it therein to the essentials of each particular situation. State, &c., v. Haben, 22 Wis. 101; In re Court of Honor of Illinois, 109 Wis. 625, 85 N. W. 497.

While the scope of the prerogative power was early definitely stated and it has thus been maintained, if the burden of work here was ever a legitimate excuse for not exercising jurisdiction, within such scope, to make a full decision in a case thought to be of a character to warrant the Court in stepping aside from its ordinary labor to entertain it at all, that ended long since. When such doctrine took root there were but three members of the Court and the equipment for labor was very crude to that now afforded. There is certainly no longer need for leaving anything undone which might properly be done because of the burden of work.

So again the inquiry is suggested, why should not the Court in all cases of great public interest, make the fullest practicable decision instead of leaving as much ground uncovered as *practicable*?

In such a situation as this it seems that the court should not
144 cease its labors till the whole subject in all *important* details shall have been exhausted. If any such shall not have been fully presented, or been overlooked, opportunity should be given, if help can be reasonably expected thereby, for further discussion at the bar, so in the end the Court may furnish executive officers and the people a plain, certain guide to go by. I urged that at first and again on the motion for re-hearing. There are many important questions left undecided. Each may furnish ground for expensive litigation. To settle all in detail will require large public and private expenditure which must be charged to waste. Conservation of time and money and peace, avoiding all such waste, can be effected by just a few days more time now, which could well be spared to devote to the matter.

145 *Authentication of Record.*

Original.

SUPREME COURT,
State of Wisconsin, ss:

I, Clarence Kellogg, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 147, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of The State of Wisconsin upon the relation of Harry W. Bolens, Plaintiff vs. James A. Frear, Secretary of State of the State of Wisconsin,

Andrew H. Dahl, State Treasurer of the State of Wisconsin, The Tax Commission of the State of Wisconsin, Nils P. Haugen, Thomas E. Lyons and Thomas S. Adams, members of said Tax Commission, Defendants, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Madison, Wisconsin, this January 30th, 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court of Wisconsin.

[Endorsed:] Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

146 *Return to Writ.*

Original.

UNITED STATES OF AMERICA,
Supreme Court of Wisconsin, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Wisconsin, in the City of Madison, this January 30th, 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court of Wisconsin.

[Endorsed:] Filed Jan. 4, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

Endorsed on cover: File No. 23,533. Wisconsin Supreme Court. Term No. 147. The State of Wisconsin upon the relation of Harry W. Bolens, plaintiff in error, vs. James A. Frear, Secretary of State of the State of Wisconsin; Andrew H. Dahl, State Treasurer, et al. Filed February 5th, 1913. File No. 23,533.

No. 447

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

THE STATE OF WISCONSIN, upon the Relation of HARRY W. BOLENS,

PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin, et al.,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFF IN ERROR OPPOSING MOTIONS TO DISMISS WRIT OF ERROR

PAUL D. CARPENTER,
Attorney for Plaintiff in Error

No. 447.

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

THE STATE OF WISCONSIN UPON THE RELATION OF HARRY W. BOLENS,

PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, Secretary of State of the State of Wisconsin, ANDREW H. DAHL, State Treasurer of the State of Wisconsin, THE TAX COMMISSION OF THE STATE OF WISCONSIN, NILS P. HAUGEN, THOMAS E. LYONS and THOMAS S. ADAMS, Members of said Tax Commission,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISONSIN

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTIONS TO DISMISS WRIT OF ERROR

AFFIDAVIT OF CHARLES W. STARK, JR.

(Title of Cause.)

STATE OF WISCONSIN, *Milwaukee County.* } ss.

CHARLES W. STARK, JR., being first duly sworn, deposes and says that he is and at all the times hereinafter mentioned was a practicing attorney, resident in the city of Milwaukee and state of Wisconsin; that during the month of January, 1913, he was a clerk in the office of Carpenter & Poss, attorneys for plaintiff and relator above named, and now is a clerk in the office of Paul D. Carpenter,

attorney for the plaintiff in error above named; that he presented the writ of error herein to the Honorable John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin, at the city of Madison, in the county of Dane and state of Wisconsin, at the chambers of said Chief Justice, on the 3rd day of January, 1913, having previously notified Russell Jackson, Esquire, Assistant Attorney General of the State of Wisconsin, of his intention so to do, and that the said Russell Jackson was present at the time of the presenting of said writ to said Chief Justice; that the said Russell Jackson vigorously objected to the allowance of said writ by said Chief Justice, but that said Chief Justice on said 3rd day of January, 1913, nevertheless allowed said writ; that the said Russell Jackson is the same person whose affidavit appears at pages 2 and 3 of the brief of the Attorney General of the state of Wisconsin herein, on his motion to dismiss the writ of error; that the object of making this affidavit is to correct the statement made on page 7 of said brief referring to the said allowance of said writ as "the formal ex parte allowance of the writ of error by the Chief Justice."

CHARLES W. STARK, JR.

Subscribed and sworn to before me, this 10th day of December, A. D. 1913.

ANTOINETTE ALDRICH,
Notary Public, Milwaukee County, Wisconsin.

Brief of Argument.

The above entitled action was brought to this Court on writ of error to the Supreme Court of the State of Wisconsin. The defendants in error now make a motion to dismiss and the Attorney General of the State of Wisconsin, professing to act for and on account of the State by virtue of a proclamation issued by the Governor of Wisconsin, makes a separate motion to di-miss.

I.

Statement of Plaintiff in Error's Case.

The Constitution of the State of Wisconsin confers original jurisdiction upon the Supreme Court of the State to issue writs of injunction and other original and remedial writs and to hear and determine the same. (Art. VII, Sec. 3.) This clause gives full jurisdiction to the State Supreme Court over any question *quod ad statum reipublicae pertinet*, affecting the "sovereignty of the State, its franchises or prerogatives *or the liberties of its people*." Such action is to be brought originally in the State Supreme Court and may be

instituted by the Attorney General, acting on his own initiative or acting on the petition of a citizen; or if he refuses to act on the petition of a citizen, then the citizen may on notice apply to the Supreme Court for permission to bring the action for the State in the name of the Attorney General, and the Court may refuse or grant such permission.

Attorney General vs. Railroad Co., 35 Wis. 425.
Attorney General vs. Eau Claire, 37 Wis. 400.
State vs. Cunningham, 81 Wis. 440;
The Income Tax Cases, 148 Wis. 456 (one of which is the instant case), *and authorities cited.*

The steps taken in this particular case are strictly correct, and in fact have not been criticised. Harry W. Bolens presented his petition to the then Attorney General of Wisconsin, setting up that the Wisconsin Income Tax Law, Chapter 658 of the Laws of Wisconsin for 1911, is wholly null, void and of none effect for that it violates numerous sections of both State and Federal Constitutions, most of these objections being set out in detail, followed by an omnibus allegation (T. 13-18); and praying that for the wrongs complained of and for the protection of himself and all others similarly situated, and for the protection of all the taxpayers of the State against the threatened invasion of their rights and liberties, and forasmuch as all said persons are remediless in the premises without the interposition of the State Supreme Court, that the Attorney General move the Court for leave to bring the action designed "so as fully to protect and secure the said rights and privileges guaranteed to the people of this State by the Constitution of the United States and the amendments thereto and the Constitution of the State of Wisconsin and the amendments thereto." (T. 18-19.)

The Attorney General refused to bring the action, making an endorsement to that effect on the petition. (T. 32.) Thereupon Bolens gave notice to the Attorney General, to the Secretary of State and the State Treasurer, and to the Tax Commission and to its members personally and in their corporate capacity, that on filing said petition and the refusal endorsed thereon he would move the Supreme Court on a designated day "for leave to commence in said Court a suit for said State and in the name of the Attorney General thereof, and upon relation of the said petition." (T. 33-34.)

This notice was duly served. (T. 34.)

On the day designated the matter was brought to the attention of the State Court, which took it under advisement. (T. 34-35.)

On October 3, 1911, the State Court ordered that on giving bond to indemnify the State leave be granted to bring the action as prayed in the petition, the question of jurisdiction being reserved, but afterwards decided affirmatively. (T. 35, 82.)

In accordance with the permission granted, bond having been giv and approved (T. 35-37), the summons (T. 37) and complaint *whi contains the allegations that relator is a citizen of Wisconsin and heavy taxpayer*, (T. 38-48) were served on the various parties in i terest (T. 48), who demurred on the ground that the Court had jurisdiction of the person of the defendants or any of them or of t subject of the action, that the plaintiff and relator had not leg capacity to sue and that the complaint did not state facts sufficient constitute a cause of action. (T. 49.)

It will be noted that practically every point raised in the briefs this motion to dismiss was raised by the second ground of demurre which is as follows: "That the plaintiff and relator has not leg capacity to sue in this, that the action is in substance and effe against the State of Wisconsin and that the consent of said state be sued therein has never been given." (T. 49.)

The Court upheld the jurisdiction and the capacity of the plainti and relator to sue, sustaining the demurrer on the merits, namely that the act attacked was constitutional. (T. 82.)

In the course of the opinion questions involving the Federal Con stitution and necessary to be decided were decided adversely t plaintiff in error, as will be hereinafter pointed out, and under th Wisconsin practice the decision of the State Supreme Court makes precedent binding on all the courts of Wisconsin on those question concerning the Federal Constitution in whatever form new action may be brought.

Attorney General ex rel Cushing vs. Lum, 2 Wis. *371.

Accordingly, the jurisdiction having been upheld; and the plea tha the action was in substance and effect against the state and that the consent of the state to sue had not been given having been overruled by the State Court; and the legal capacity of the plaintiff and relator to sue having been sustained; the plaintiff, namely, the State of Wis consin, represented by the taxpayer Bolens as relator and by his counsel (strictly in accordance with the rights unavoidably implied under the Constitution and the judgment of the Court) applied for this writ of error. The Attorney General's office, as shown by the affidavit at the beginning of this brief, vigorously opposed the appli cation, but the writ was nevertheless allowed by the Chief Justice of the Wisconsin Supreme Court.

But whether granted in the face of opposition or *ex parte*, the duty of the learned Chief Justice of Wisconsin was, of course, plain. An application for a writ of error is not allowable as a matter of right, but its allowance is to be determined by the Judge from an exam ination of the record.

Greely vs. Townsend, 25 Cal. 604;

Twitchell vs. Commonwealth, 7 Wall. 321;
Spies vs. Illinois, 123 U. S. 131.

In the Twitchell case the then Chief Justice points out, page 324, *et seq.*, that writs of error to state courts have never been allowed as of right; that it is the duty of the Judge to ascertain whether any question cognizable in this Court on appeal was made and decided in the State Court and whether the case on the face of the record justifies the allowance of the writ; that the allowance in general will be made where the decision appears to have involved a question within the appellate jurisdiction of this Court, but should be refused when no such question appears to have been made or decided, "and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is, nevertheless, clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this Court."

In the Spies case the then Chief Justice reiterates this doctrine. (Page 143.)

Undoubtedly, as held in the Greely case, the same rule which applies to a Justice of this Court applies to a Chief Justice of the State Court on allowing the writ, and the learned Chief Justice of Wisconsin having presided at the hearing in this case and written the exhaustive opinion in which the State Court assumed jurisdiction, must be presumed to have known what that Court meant by that decision. His allowance of the writ says in effect to this Honorable Court that, in his opinion, the decision involves a question within the appellate jurisdiction of this Court and that, in his opinion, the case on the face of the record justifies the allowance of the writ—*a most important declaration, since the whole basis for these motions is Counsel's plea that the State Court did not intend to give relator power to obtain this writ, a plea thus contradicted by the Chief Justice of that Court.*

A case somewhat analogous to this under the Wisconsin practice is where a citizen may prefer charges against a county official triable before the County Board. In that case the charges are made and the proceedings had in behalf of the State, but the relator conducts them and in case of a decision favorable to the official on a writ of certiorari issued out of the Circuit Court, the relator may prosecute the appeal in the name of the State to the Supreme Court.

McCarty vs. Board of Supervisors of Ashland Co., 61 Wis. 1.

It is true that the precise question before this Honorable Court on the motions to dismiss has never been decided because this is the first of the leading Wisconsin cases which construe the Wisconsin Constitution and vindicate this form of action to be brought to this Court.

But the Wisconsin Constitution permits the State Court to autho ize this form of action, although, as Justice Timlin says in his d senting opinion (T. 93), it practically gives the control of the li gation to the relator and puts his private counsel in the place of t Attorney General of the State. Analogous actions brought in Sta Circuit Courts in the name of the State without authority of t State Supreme Court may be appealed in the name of the State b the relator to that Court, and surely the Wisconsin practice contem plates that a constitutional question raised in this manner by th State Supreme Court's authority may be taken by the relator to th Honorable Court by writ of error sued out in the name of the Stat Had the view of the Wisconsin Court been different, doubtless it Chief Justice would not have allowed the writ of error, but would have instructed plaintiff in error to apply to one of the Justices o this Court.

Surely he who may maintain the action may maintain the appea or writ of error, and since this is the method in Wisconsin for th determination of such questions, the citizens of Wisconsin, for whos benefit under the State Constitution this action is brought, are enti tled to have that determination correct. In other words, the State Supreme Court deciding in this action questions concerning the Federal Constitution was bound to decide them correctly, and if the relator standing in the place of the State feels that the decision was incorrect, he is entitled to seek its rectification elsewhere.

II.

Answer to Briefs of Moving Parties.

Counsel for the moving parties involve themselves throughout their briefs in singular confusion and contradictions.

The Attorney General (predecessor of the present incumbent) re fused to bring this action and the relator was allowed to bring it for the State by order of the State Supreme Court. The present Attor ney General now moves to dismiss, basing his motion upon a very curious proclamation by the Governor of Wisconsin (recited in his brief) requesting him to take this action, and upon the affidavit of the former Assistant Attorney General to the effect that counsel for relator never received any authority to represent the State or take any steps on its behalf—this in despite of the order of the State Court permitting the bringing of the action in this form.

(1.) *The Attorney General's Brief.*

This suit, the Attorney General urges, is peculiar and probably could not exist anywhere except in the Supreme Court of the State of Wisconsin.

(However, the same practice has been followed in one state: *State ex rel. Moore vs. Archibald*, 5 No. Dak. 359, 376, 377; see also *State ex rel. Byrne vs. Wilcox*, 11 No. Da. 329, 335. And the Supreme Courts of five other states have plainly said that they have the power to permit such actions and will not hesitate to use the power when the occasion arises. *People ex rel. Ayres vs. State Auditors*, 42 Mich. 422, 429, 430; *Vail vs. Dinning*, 44 Mo. 210, 215; *People vs. McClees*, 20 Colo. 403; *State ex rel. Lloyd vs. Elliott*, 13 Utah, 200; *Everett vs. Board of County Commissioners*, 1 So. Dak. 365.)

The Attorney General then, at page 4, urges that in the case at bar the State Court retained the action as one by the State to which the relation of the relator ceased when he had brought the parties before the Court: but an examination of the passages of the opinion referred to will show that all the Court said was that the relator *might* drop out and the Court still retain jurisdiction. *There was no ruling that the relator dropped out of this case.*

At page 5 the Attorney General proceeds to set up a number of allegations not based on the record and referring to matters of which this Honorable Court will not, we submit, take judicial cognizance. There is nothing to show in this case, or in fact, that the Wisconsin Income Tax Law has been met with loyalty rather than resistance by the taxpayers and nothing to show that at any general election the will of the electors in favor of retaining the Income Tax Law was declared. It is true that in the last state campaign in Wisconsin the Income Tax Law figured prominently, bringing a tremendous accession of voters to the party which denounced it; but many other issues were at stake, and religious intolerance was bitterly invoked against the leading candidate on the opposition ticket and played at least a considerable, perhaps a decisive, part in bringing about his defeat, which even so was by a narrow margin.

The long argument made and the numerous cases cited to show that no sovereign government can be made a party to an action in Court, at any rate as defendant, unless there is some statute permitting it, are quite beside the point, since here the State Constitution permits the State Court to give the authority, as was done in this case. "The legislative authority," says the Attorney General, "of any person instituting any action in behalf of a State is always a necessary question." (Page 6.) But here it is a constitutional authority. The Duff case cited by the Attorney General on page 7 of his brief (*The State vs. Duff*, 83 Wis. 291) is not in point, for that was not an action brought by the State on the relation of a citizen; but the McCarty case cited by us above is in point so far as a State decision can be in point upon this question, for there the relator was held to be proper person to prosecute the appeal in the name of the State.

The deductions which the Attorney General makes at page 7 from the opinion of the State Court are wholly unwarranted. There is not in this case, or in any of the numerous other Wisconsin cases, any

suggestion that the relator, raising federal questions, is confined to the State Court. As stated above, the question has never been directly raised or decided in this Honorable Court, but we submit that since a relator authorized to begin an action in the Circuit Court may appeal to the Supreme Court of the State in the name of the State, it would certainly follow that the relator beginning an action directly in the Supreme Court of the State under constitutional authority and with the permission of that Court, would by necessary implication have the right to bring to this tribunal by writ of error for the State questions concerning the Federal Constitution decided adversely to his contentions by the State Court, particularly when he himself as a tax-payer is one of the class affected by this change in the system of taxation.

As shown by Mr. Stark's affidavit printed at the beginning of this brief, the Attorney General's allegation that the allowance of the writ of error by the Chief Justice of Wisconsin was *ex parte* is entirely incorrect—it was opposed by the Attorney General's office and was granted only after a sharp discussion, so that there is no ground whatever for the Attorney General's deduction that the allowance of the writ was not an exercise of the State's discretion. However, an application for a writ of error is not allowable as a matter of right, but its allowance is to be determined by the judge from an examination of the record as shown above; and the Chief Justice of Wisconsin by allowing it shows that this power was intended to be given to the relator by the State Court's decision.

In short, the relator having been granted permission to bring this action on behalf of the State, after the Attorney General had refused to bring it, was by necessary implication granted permission to do all things which the State by its duly authorized officers could have done had the Attorney General consented to institute the action.

The Attorney General's plea (p. 8) that the State's sovereignty will be impaired if this practice be carried to ultimate results is a most peculiar plea for the chief law officer of a State to make when the practice criticised is authorized by the State Constitution.

The allegation (p. 8) that it nowhere appears in the complaint that the relator has any rights which might suffer by the dismissal of his action is beside the point. This is an action for the State to protect the liberties of its citizens from invasion; but were it otherwise the allegation of the complaint that the relator is a citizen and taxpayer is (as the State Court held) sufficient; a holding whose correctness will be manifest if this Honorable Court will take the trouble to examine this particular act; for by its revolutionary change in the system of taxation, by its withdrawal from municipalities of the right to tax intangible personal property, and by the multiplicity of questions thereby raised and the probable impairment of municipal

credit in the money markets, *all taxpayers, including the relator, are deeply affected.*

The Attorney General concludes his brief by stating again that under the opinion of the State Court in this matter the relator is eliminated and that his name as relator should have disappeared. This is incorrect, as the most cursory examination of the passages cited (T. 70) will show. The Court says (italics ours): "The private relator *may* have a private interest which *may* be extinguished (if it be severable from the public interest), yet still the State's action proceed to vindicate the public right." This is no ruling to the effect that a private relator's interest is necessarily extinguished and certainly no ruling excluding the relator in this case.

(2) *Brief of the Defendants in Error.*

This immaterial argument as to what standing the relator has under the allegations of his complaint, with which the Attorney General's brief concludes, is the same with which the Brief for the Defendants in Error opens. And the latter brief immediately proceeds on page 3 to quote from the opinion of the State Court (T. 72) to the effect that if the law should go into operation for a year or two and then be held unconstitutional great confusion would result. The italics on page 3 are counsel's own, not the Court's, and it is strange that from that remark of the Court counsel should argue that at the end of a year or two all confusion is necessarily at an end. The disbursements continue, the exactions continue, the exemptions continue, and each year of operation under the law, if it be as we claim invalid, and if the collections under it far exceed $3,000,000 per annum as announced, will increase instead of diminishing the confusion.

Taking up the argument of counsel for defendants in error at page 4 of their brief, we have already answered their first and second subheads of argument: the relator has constitutional and judicial authority to carry this action through for the State and for the benefit of its citizens; the writ can not be dismissed by consent because all the parties do not consent. The third subhead (pp. 4-7), which is their lengthiest, is based upon the same odd confusion prevailing throughout their briefs. This is an action, we repeat, to protect the liberties of the citizens of Wisconsin from invasion; an action permitted by the State Constitution; an action authorized by the State Court; and the general argument made that the State as a governmental entity must suffer injury before it can sue while true as a general proposition goes to pieces in the face of these facts.

We ask pardon of this Court for iterating and reiterating this statement but it is the answer to the iterated and reiterated argument of counsel for the moving parties, an argument founded, as we have said, on their evident confusion concerning the status of this matter.

(We remark in passing that the authorities cited on p. 7, apparently

to the proposition that a State may not take part in obtaining a w
of error, have no bearing whatever on that proposition.)

But counsel urge under their fourth subhead (p. 8) that since t
decision the cause of action has ceased to exist. The cause of acti
they say is the injury which would result if the statute were held vo
after being enforced for a year or two; but surely the confusion wi
be greater after five or six years. The money, they say, then threa
ened with expenditure, has been spent; but the money of the Stat
is continuing to be spent, of course. The cry that the State Cour
must have dismissed the action if the statute had been in operation fo
a year or two is utterly unsupported by anything in the State Court'
opinion. How do counsel know that taxes have been paid in mos
cases voluntarily under this act? Counsel say there has been ample
time to test the validity of the statute in actual suits by persons
injured; do counsel mean that no such suits have been instituted?
But such suits can assail only this or that feature of the law since it
has been held constitutional as a whole—this action assails it as a
whole.

Counsel say that the Act has been in many ways amended. Cer-
tainly the clauses successfully amended are thereby withdrawn from
consideration on this writ of error, but the main contentions of plaint-
iff in error are untouched.

We claim that the statute, even as amended, violates Constitutional
guarantees by grotesque classifications, by taxing certain people for
the incomes of other people, by its system of double taxation; that
it impairs the obligation of various contracts; that by radically reduc-
ing the taxing power of municipalities, it impairs the obligation of
municipal bond contracts; and that it is unconstitutional on other
grounds. The seriousness of these propositions can hardly be over-
stated, and we urge this Court to deny the motions to dismiss in order
that this case may be heard on the merits.

Cohen v. Virginia, 6 Wheaton, 264.

III.

This is a case in which this Honorable Court should keep jurisdic-
tion and which it should decide upon the merits. It is to review
a judgment of the highest court of Wisconsin, a final judgment in
which is upheld the validity of a statute attacked as repugnant to
the Constitution of the United States and the amendments thereto.
The record affirmatively shows that there are involved federal ques-
tions necessary to the determination of the cause and that the cause
could not have been decided as it was without such decision concern-
ing the federal questions; for in determining the ground upon which
a judgment in a state court was rendered, this Court may refer to
the opinion of that Court.

Wood Co. v. Skinner, 139 U. S. 293-295.

Now the opinion of the State Court says: "Many provisions of the law are attacked as offending against either the federal or the state Constitutions. We shall only treat the contentions which might from some point of view be considered as going to the validity of the whole act." (T. 72.) And the opinion then proceeds to deal with the Federal Constitution in relation to the progressive features of the act and the claim that they are discriminatory, the complaint concerning double taxation (T. 74), the contentions regarding the exemption features of the act and the provision that the husband and father must pay the tax upon the income of his wife and the incomes of his children under eighteen (T. 77, *et seq.*) and the classification as to the income of corporations (T. 79-80) etc. These questions are admittedly federal questions, are categorically held by the State Court to demand favorable determination if the validity of the act as a whole is to be sustained and are so favorably determined against the contention of the plaintiff in error.

The opinion of the Court holds that jurisdiction may be taken in these two among other cases:

> "(7) a state officer is about to perform an official act materially affecting the interests of the people at large which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions; and
>
> "(8) the situation is such in a matter *publici juris* that the remedy in the lower courts is entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied. It is not meant by this attempted classification that no cases which do not fall within one or the other of the classes can ever call for the exercise of the original jurisdiction, but simply that cases falling within these general classes have been held to be properly within the original jurisdiction." (T. 69-70.)

and establishes among others these negative propositions:

> "(2) A case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained.
>
> "(3) A case will not be dismissed, however, because there is a private interest involved with the public interest, provided the private interest be incidental merely, and the vindication of the public right be the primary purpose of the action.
>
> "(4) An action involving a private as well as a public interest will not be dismissed merely because the private interest may drop out, provided the public and private interests be severable and the public interest still exists." (T. 70.)

From the above quotations it is evident that the relator need not show that he suffers a personal injury as an income tax payer, provided that *he is one of a body of citizens and tax payers, as the complaint indeed alleges, whose rights would be invaded by this law.* We beg to quote to the Court the general summary from the opinion of the Wisconsin Court in which that Court finally takes jurisdiction in this case:

> "In the present case we go no further than to state these general principles. We do not find it necessary to decide whether the alleged illegal expenditure of funds alone presents a case of such exigency as to justify the use of the original jurisdiction of this Court to prevent such expenditure. There are other and more important features in the present case which in our judgment present a proper case for the exercise of the original jurisdiction.
>
> "The law which is attacked here, if it be valid, makes a radical change in the present system of taxation over the whole state.
>
> "Since the days when Hampden refused to pay the ship money unjust taxation has been deemed by English speaking nations, at least, to vitally concern, if not to destroy, the liberties of the people. Such taxation has been deemed to justify armed resistance, and, if need be, revolution. Insistence upon it cost Charles I his life and England an empire. If this law in its essential provisions violates constitutional provisions, and hence is void, taxation under it is, of course, unjust, and the sums which may be collected under it are unlawfully collected. It makes in terms a very sweeping change in the methods of taxation in every taxing district of the state, and shifts the burdens of taxation so that many will pay more than under the old system, while many will pay less. If it should go into operation for a year or two and then be held unconstitutional in some actual case, the confusion created in the financial affairs of the state and of every municipality would unquestionably be great. We cannot but regard any serious question as to the constitutionality of such a law as a question seriously affecting the prerogative of the state, as well as the liberties of the people; hence we conclude that the case presented is one justly calling for the exercise of the original jurisdiction of this Court." (T. 72.)

Thus jurisdiction was taken by the State Court. The Attorney General having refused to act the State Court permitted the relator to sue for the State. The complaint sufficiently shows the relator's personal interest; at the same time the suit is for the State to protect the liberties of its citizens and the charge of the litigation has been delivered into the relator's hands by the State Supreme Court by authority of the State Constitution after the refusal of the State's law officers to conduct it. The Chief Justice of Wisconsin has, by allowing the writ of error, certified to this Honorable Court, that in his opinion the record justifies the relator in taking this step. The many authorities cited in the briefs of the moving parties are distinguishable because the actions were wholly different. We urge that the motions to dismiss should be denied, and the case heard on its merits.

Respectfully submitted,

PAUL D. CARPENTER,

Attorney for Plaintiff in Error, The State of Wisconsin on the relation of Harry W. Bolens.

NO. 447.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

STATE OF WISCONSIN EX REL. BOLENS,

Plaintiff in Error,

vs.

JAMES A. FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN, ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF DEFENDANTS IN ERROR ON THEIR MOTION TO DISMISS.

GEORGE G. GREENE,
Attorney for Defendants.

J. M. DODGE,
Of Counsel.

NO. 417

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

THE STATE OF WISCONSIN UPON THE RELATION OF HARRY W BOLENS,

PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN, ANDREW H. DAHL, STATE TREASURER OF THE STATE OF WISCONSIN, THE TAX COMMISSION OF THE STATE OF WISCONSIN, NILS P. HAUGEN, THOMAS E. LYONS AND THOMAS S. ADAMS, MEMBERS OF SAID TAX COMMISSION,

DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR ON THEIR MOTION TO DISMISS THE WRIT OF ERROR HEREIN.

STATEMENT.

The constitution of Wisconsin provides: "Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive." Sec. 1, Art. 8. Chapter 658 of the laws of said state, enacted July 13th, 1911, imposed graduated and progressive taxes on incomes. (Printed Trans. p. 20 et seq.) August 8, 1911, Harry W. Bolens petitioned the Attorney General of said state to move its supreme court for leave to bring an action, on his relation, to enjoin defendants in error from taking any action under or to enforce said chapter, on the ground that it violated the federal and state constitutions (Trans. p. 10 et seq.). The Attorney General refused to move; whereupon Bolens made the motion on his petition to the Attorney General. Oct. 3, 1911, the state court granted the motion (Trans. p. 35), reserving the question of jurisdiction, and

Oct. 14, 1911, the relator filed the complaint which, in substance, is identical with said petition (Trans. p. 38, et seq.).

The *complaint* alleges that relator "is, and for the past ten years has been a citizen of the United States and of the state of Wisconsin and a resident" thereof; that he has been and is a taxpayer of said state and has paid large amounts of state, county, city and school taxes; that said Chapter 658 was enacted; that defendants recognize its validity; that said Tax Commission threatens to appoint officers and fix their salaries, in execution of the statute as it provides; that the State Secretary and Treasurer intend to audit and pay such salaries and the expenses of enforcing the statute; that the Tax Commission threatens "to assess, by the pretended authority" of said chapter, "every income received during the preceding calendar year alleged to be liable to taxation", "to the oppression of the people of said state, including the relator and all persons similarly situated"; that, by such enforcement of said chapter, "great and needless expense has been and will be entailed upon the taxpayers of" said state, and a multiplicity of suits will result whereby such taxpayers will suffer irreparable injury; and that said chapter is void for violation of federal and state constitutions. The complaint does not show that relator has any income taxable by the statute; or that, if he has any, his tax would be more with than without the statute; or that, if injured, the remedy at law is not adequate.

Grounds of defendants' *demurrer* were that (1) the court had no jurisdiction, and (2) the complaint did not state a cause of action. The state court overruled the first and sustained the second ground. It rested its jurisdiction solely on the provision of the state constitution that gives it "power to issue writs of *habeas corpus*, mandamus, injunction, *quo warranto*, *certiorari* and other original and remedial writs, and to hear and determine the same". Sec. 3, Art. VII. This, it decided, gave it original jurisdiction of the action as one to vindicate and protect "the sovereignity of the state, its franchises or prerogatives, or the liberties of the people". It said:

> "This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself, when it appears to be necessary to vindicate or protect its prerogatives or franchises, or the liberties of the people; the state uses it to punish or prevent wrongs to itself or to the *whole* people; the state is always the plaintiff and the only plaintiff, whether the action is brought by the Attorney General, or against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit; he is a mere incident; he brings the public inquiry to the attention of the court and the court, by virtue of the power granted by the constitution, commands that the suit be brought by and for the state". (Trans. p. 70).

The action, the court said, does not "come within its original jurisdiction * * * if it be a mere taxpayer's action" (Trans. p. 71). It thus defines the scope of the action:

> "If the law in its *essential* provisions violates constitutional provisions and hence is void, taxation under it is, of course, unjust, and the sums which may be collected under it are unlawfully collected. It makes in terms a very sweeping change in the methods of taxation in every taxing district in the state, and shifts the burdens of taxation so that many will pay more than under the old system, while many will pay less. *If it should go into operation for a year or two* and then be held unconstitutional in some *actual case*, the confusion created in the financial affairs of the state and every municipality would be unquestionably great. We can not but regard any serious question as to the unconstitutionality of such a law as a question seriously affecting the prerogatives of the state as well as the liberties of the people; hence we conclude that the case presented is one justly calling for the original jurisdiction of the court." (Trans. p. 72).

Since the public injury—the "confusion"—that would result from adjudging the statute void after its enforcement, was thus the ground of exercising jurisdiction to determine its validity before enforcement, only provisions which, if void, avoid the whole act were material; for if valid as a whole, it must go into operation and the validity of any severable provision could be tested in actual cases, as they arise in course of its enforcement. The court said:

> "Many provisions of the law are attacked as offending against either the federal or state constitution. We shall only treat the contentions which might from some point of view be considered as going to the validity of the *whole act*" (Trans. p. 72). "As a whole we regard the law as constitutional. If there be provisions which will not stand the test, they are not provisions of such a nature that they must be considered as the inducement to or as compensation for the balance of the law." (Trans. p. 81).

While the holding and judgment of the state court went no further than that the injunction should not issue, it is perhaps discoverable that such court more or less specifically denied a claim or contention that the income tax law violates the 14th amendment of the federal constitution:

1. In its progressive and graduated method of taxing incomes.
2. In taxing land and its income.
3. In its classification of exemptions.
4. In classifying individuals and corporations for different progressive rates.
5. In not, in terms, excepting national banks from corporations whose incomes are taxed.

ARGUMENT.

I.

The writ of error should be dismissed because obtained witho the authority or consent of plaintiff in error.

The state is the sole plaintiff (Trans. p. 71). The writ was obtain without its authority. It moves to dismiss on this ground. We ref the Court to the printed brief on that motion. It is also cause f dismissal on motion of defendants in error.

Ex parte Dorr, 3 How. (U. S.) 103.
Anonymous, 11 Ill. 488.
7 Enc. of Plead. & Prac. 802, 804.

II.

There should be dismissal of the writ because all the parties re quest it.

Both the state and defendants in error move for dismissal. "A plaintiff in error is entitled, as matter of right, to dismiss the writ."

7 Enc. of Plead. & Prac. 906.
Latham vs. U. S. 9 Wall. 145, 146.
U. S. vs. Young, 94 U. S. 258.
Birch vs. Brown, 5 Mich. 31.
Hancock vs. Marsh, 3 Ill. 491.

If, in exception, there are cases where a plaintiff can not dismiss his action against the will of the defendant, there is no action that *both* parties may not have dismissed. Whether the writ of error is a new action or the continuation of an action, all the parties to it must have right to end it.

III.

The writ should be dismissed because plaintiff in error is not injured by the decision of the state court.

"In order that the validity of a state statute may be drawn in question under the second clause of section 709 R. S. (U. S.) it must affirmatively appear that the plaintiff in error has right to draw it in question by reason of a personal interest which has suffered, or

may suffer, by the decision of the state court in favor of the validity of the state statute."

Tyler vs. Judges, 179 U. S. 405.
The Winnebago, 205 U. S. 354, 360.
Red River etc. Bank vs. Craig, 181 U. S. 548.
Hooker vs. Burr, 194 U. S. 415, 419.
New York vs. Reardon, 204 U. S. 152.
Hampton vs. St. L., etc. Ry. Co., 227 id. 456, 468.

It does not affect the rule that the state court in the instant case *has* decided in favor of the state statute on complaint of one not a sufferer (Cases above). And, generally, to whatever court the writ goes, and on appeal, to give jurisdiction plaintiff in error or appellant must be injured by the challenged statute, if void.

Darnell, Exr. vs. Indiana, 226 U. S. 390.
Yazoo etc. Ry. vs. Vinegar Co. 226 U. S. 217.
Lee vs. New Jersey, 207 U. S. 67.
Citizens Nat. Bank vs. Kentucky, 217 U. S. 443.
Standard etc. Co. vs. Wright, 225 U. S. 540.
Williams vs. Walsh, 222 U. S. 415.
Keeney vs. New York, 222 U. S. 525, 537.
Rosenthal vs. New York, 226 U. S. 260.

1. *Within the rule, there is no injury to relator.*

First. Apart from the fact that relator is not a party (Trans. pp. 67–70), it does not appear that he has any taxable income; or that, if he has one, his tax will not be less with than without the statute. As the state court says, the statute makes such changes in taxation that many will pay less than under the old system (Trans. p. 72). Relator may belong to that class.

Second. Had relator an income injuriously taxed under the statute, there would from that be no jurisdiction of this action. One whose rights *will be irreparably* injured by the enforcement of an unconstitutional statute may sue in equity to prevent its enforcement. But for that the remedy at law must be inadequate. Sec. 723 U. S. R. S. provides: "Suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law". The rule is: "The collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy at law, by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction." *Arkansas B. & L. Assn. vs. Madden*, 175 U. S. 269, 272. For jurisdiction in equity, an unconstitutional tax must be a cloud on plaintiff's title to land or subject him to a multiplicity of suits, etc; other-

wise, his remedy by paying the tax and recovering it by action
law is "plain, adequate and complete". The special facts showi
such cloud, multiplicity or other ground of jurisdiction in equity mu
be averred.

Cruickshank vs. Bidwell, 176 U. S. 73, 80.
Dows vs. Chicago, 11 Wall. 108.
Milwaukee vs. Koffler, 116 U. S. 219.
Van Cott vs. Supervisors, 18 Wis. 247.

The complaint does not aver any such facts. From the necessity of public revenue, equity interferes with the execution of tax laws wit extreme reluctance

Lee vs. New Jersey, 207 U. S. 70.
Darnell, Exr. vs. Indiana, 226 U. S. 390.
Rosenthal vs. New York, 226 U. S. 260.

Further in this connection it should be noted that relator does not assert any injury to himself in any of his assignments of error except one, the 2d, Trans. pp. 6, 7, and 8. With that exception the assignments are to the effect merely that each asserted error, "deprives many persons * * * of their property without due process of law", without suggestion that Mr. Bolens is among such many persons. A mere champion for others cannot maintain the writ.

Smith vs. Indiana, 191 U. S. 149.
McCandless vs. Pratt, 211 U. S. 437.

The exceptional assignment of error, No. 2, which only includes the relator among the injured is bad because it is for errors for *failure* to decide, etc.; and is we think too general to justify consideration and too obviously frivolous as to some at least of the collectively criticised provisions of the statute to arouse a duty to search for substantial merit or good faith as to others

2. *The state is not a sufferer by the decision.*

First. It is not within the protection of the 14th amendment of the federal constitution as to which the court held the statute valid. That provision is: "No state shall make or enforce any laws which shall abridge the privileges or immunities of *citizens* of the United States, nor shall any state deprive any *person* of life, liberty or property, without due process of law, nor deprive any *person* within its jurisdiction of the equal protection of the laws". This protects citizens and persons against action *by* the state; and for the state to sue to prevent or redress its own action in violation of the provision, is for a wrong doer to seek judicial relief against his own wrong.

That the state constitution specially grants jurisdiction of such anomalous suits to a state court, does not give it to this court; does not affect the rule that no one can complain in a federal court that

a state statute violates the amendment, unless he is a citizen or person who suffers by the violation. It is impossible, within that rule, to regard the state which is prohibited to act, as a sufferer by its violation of the prohibition. This court will not determine the validity of a state statute under such prohibition on writ of error from a state court, unless plaintiff in error is a *person or citizen* injured by violation of the prohibition, although the state court had and exercised jurisdiction to determine such question without such a plaintiff.

Tyler vs. Judges, 179 U. S. 405.
Red River etc. Bank vs. Craig, 181 U. S. 548.
Hooker vs. Burr, 194 U. S. 415, 419.
New York vs. Reardon, 204 U. S. 152.
The Winnebago, 205 U. S. 354, 360.

Second. The decision of the state court is *in favor* of the state; sustains a statute enacted by its legislature; enforces its policy in the provision of its revenue. It may be said the state court took jurisdiction because it was better for the state to have the statute condemned, if void, before than after enforcement; and that, hence, if the decision sustaining the statute is wrong, the state is injured by it. But within the principle considered, one does not suffer from a decision in his favor because it might be better for him to have the decision reversed in the instant case than overruled in some other. Besides, the reason of the state court assuming jurisdiction no longer exists. Since the decision, on its faith, the statute has been enforced for two years. All the confusion the court aimed to avoid will now result from reversing the decision.

In form the complaint is the state's. It claims the statute is unconstitutional and prays restraint of its enforcement; and so the decision that the statute is valid and denying relief is, in form, against the state. But, in substance, the complaint is the relator's; was framed and filed by him only. A state must act by its governmental officers and bodies. The state legislature asserted the validity of the statute by enacting it. The complaint shows that every officer of the state charged, generally or specially, with the execution of the statute claimed its validity. The Attorney General maintained their claim. The decision sustains the validity of the statute. The decision is as completely in favor of the state as if made in a suit against defendants in error, by a citizen or person with a taxable income, who would be irreparably injured by the statute if void.

Further no assignment of error hints at any injury to the state as a governmental entity in which capacity, if at all, it must sue.

IV.

Since the decision, the cause of action has ceased to exist.

The cause of the action is the injury to the state—to its prero
tives and the liberties of the people—that would result from the e
fusion of its revenues, if the statute were held void *after* it had b
enforced for a year or two (Trans. p. 72). The money of the st
then threatened with expenditure has been spent. To avoid such
jury constituted the only object which might support the action;
sole ground on which the court exercised its special jurisdicti
Had the statute been in operation for a year or two when the co
made its decision, it must have dismissed the action; for then,
decision in it adverse to the statute would have caused the confusi
deplored, as much as a like decision in an "actual case".

That is the situation now. The state court's decision was
March 12, 1912. The writ of error was not applied for until Jan.
1913. The statute has now been in operation for two fiscal year
on faith of the decision. Taxes under it have been paid in mo
cases voluntarily by any real sufferers. To adjudge it void on th
writ will cause the confusion the court took jurisdiction to avoid
to avoid which is the object of the action as justified by the stat
court; and the injury from which is the cause of action. There ha
been ample time, since the decision, to test the validity of the statut
in actual suits by citizens or persons specially injured by the statute
if void. Decision that it is void in such suits will now cause n
more confusion than like decision on this writ. When the cause o
action and ground of jurisdiction have thus failed since the de
cision, a writ of error, or appeal to review it, will be dismissed.

County of San Mateo vs. Ry. Co. 116 U. S. 138.
California vs. Ry. Co. 149 U. S. 308.
Kimball vs. Kimball, 174 U. S. 158.

Since the decision, the state legislature has in many ways amended
and changed the statute. Decision now as to provisions held valid
by the state court which have been changed may be of moot questions;
and as to provisions not specifically changed, will involve full exam-
ination of the new statute to fix their construction and effect in view
of new provisions related or in *pari materia*, as also of the practical
construction and application of the various provisions which, as might
have been anticipated, have obviated many of the detail criticisms
and defects which counsel for relator suggested in argument. A
schedule of amendments appears as an appendix to plaintiff's brief
on its motion to dismiss, submitted herewith.

V.

This writ should be dismissed (*Eustis vs. Bolles*, 150 U. S. 361) for the reason that it does not affirmatively appear that any opinion entertained by the State court upon any of the federal questions raised was necessary to the ultimate decision and judgment denying the injunction. The concluding declaration was "As a whole we regard the law constitutional. If there be provisions which will not stand the test they are not provisions of such a nature that they must be considered as the inducement to or as the compensation for the balance of the law. They may drop out and leave the law intact in its fundamental and essential features." (Trans. p. 81). This is a perfectly good reason for the exercise of the discretion inherent in a court of equity in deciding not to arrest completely a broad scheme or policy of the legislature and throw the whole fiscal affairs of a sovereign state into confusion, but to leave the rights of any individual which are threatened thereby to be vindicated and protected when and if he shall assert them and ask protection; an event purely hypothetical. Resistance to the enforcement of the law by individuals under claim that it invades one or another of their constitutional rights may never be made or made so rarely that the effect on the revenues, or on the broad legislative policy, will be negligible or vastly less than the inconvenience and confusion surely imposed by such an injunction as prayed. Legal rights may exist, nay they may be entirely clear, but the refusal of an injunction is by no means necessarily a denial of these rights but mere exercise by a court of equity of its discretion, whether those rights cannot be adequately enforced by ordinary legal procedure, or whether drastic interferences by injunction may not be fraught with greater injustice to others than could result to plaintiff from confinement to his legal remedies. Thus the large income tax payer, even if not patriotic, may well prefer to pay the four or five per cent on his income in order to escape the old one and a half or two per cent tax on the principal of the bonds or securities from which it is derived or to avoid the perils of criminality in trying to evade the latter. *Warden vs. Fond du Lac County*, 14 Wis. 618; *Pettibone vs. Ky.*, ib. 443; *Converse vs. Ketchum*, 18 Wis. 202, 207; Story Eq. Jur. 13 Ed., Sec. 957—b; 22 Cyc. p. 782 & 784.

A fortiori when the legal rights asserted are doubtful.

There could hardly be a case wherein more cautious and anxious care should be exerted than the present, where the people of a commonwealth by popular vote and by their legislature as well had expressed their wish that a new plan for raising revenue should be substituted for an existing one which by years of trial had been productive of great injustice and inequality,—and had failed as a reve-

nue producer; when it seemed probable that the ardent desire of the people to escape those ills would induce them to yield to the burdens or possible inequality of the new as an escape from greater ones; where the evils to the state and to the government from such a paralyzing injunction were obvious and terrible and where the asserted injuries to legal rights were doubtful until executive construction of the law could be had, and, generally speaking, were easy of escape either by such construction or by amendment, and, of course, through the courts in any case where a taxpayer resisted them. Though the law may contain an unconstitutional provision it was yet well within the field of wise discretion to refuse the injunction. That would not deny the threatened rights.

The general rule as to the necessity of affirmative and substantially unambiguous showing that the decision assailed rested on the federal question alone and that no other sufficient consideration also induced that conclusion is supported by so many decisions in this court and so uniformly that we need cite but a few of the illustrative and most analogous cases.

De Saussure vs. Gaillard, 127 U. S. 216.
Johnson vs. Risk, 137 id. 300, 307.
Wood Co. vs. Skinner, 139 id. 293, 295.
Yesler vs. Comm'rs, 146 id. 646.
Eustis vs. Bolles, 150 id. 361.
Harrison vs. Horton, 171 id. 38.
Chappel Co. vs. Sulphur, etc., Co., 172 id. 465.
Lawry vs. S. C. Co., 179 id. 196.
Adams vs. Russell, 229 U. S. 353.

In conclusion we most respectfully urge upon the court the propriety and advisability of considering the motions to dismiss before it is necessary to prepare it for argument on the merits. The positions of the assailants of the law bristle with a multitude of contentions many of them of the broadest scope involving extended presentation and analysis of vast numbers of authorities, a work most burdensome to counsel and to this court. While we may believe most of the objections to the law frivolous or not well taken, yet we must recognize the at least possibility of error on our part in that respect, and dare not, in justice to the interests we have in care, forbear full presentation of arguments and authorities bearing on the merits of each contention in contemplation of the contingency that this court may feel a duty to consider them.

GEORGE G. GREENE,
Attorney for Defendants.

J. E. DODGE,
Of Counsel.

8

NO. 687.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

THE STATE OF WISCONSIN UPON RELATION OF HARRY W. BOLENS,

PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN, ET AL.

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF THE STATE OF WISCONSIN ON ITS MOTION TO DISMISS THE WRIT OF ERROR.

WALTER C. OWEN,
Attorney General of the State of Wisconsin.

J. H. DODGE,
Of Counsel.

NO. 447

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

STATE OF WISCONSIN EX REL. H. W. BOLENS,
PLAINTIFF IN ERROR,

vs.

JAMES A. FREAR, ET AL.,
DEFENDANTS IN ERROR.

Motion to Dismiss

Now comes the State of Wisconsin, named as plaintiff in error in
he above entitled action, and appearing specially for the purpose of
his motion only, moves the court that the said action and the writ
f error from this court be dismissed for the reason that said writ was
ssued and said action commenced without consent or authority from
aid State and is in opposition to its will; and that it deems unwise
oth the procurement and the further maintenance of said writ.
Which said motion is based upon the direction from the Governor
the State of Wisconsin, of which a certified copy is annexed, and
e affidavit of Russell H. Jackson also annexed.
Dated November 3rd, 1913.

WALTER C. OWEN,
Attorney General of the State of Wisconsin.

The defendants in error consent to the foregoing application of the
te of Wisconsin and that the above named action and the writ of
or entitled therein be dismissed.

GEO. G. GREENE,
Attorney for Defendants in Error.

Honorable WALTER C. OWEN,
Attorney General of the State of Wisconsin.
IR: Having received notice that an action has been instituted in
Supreme Court of the United States in the name of the State of

Wisconsin on the relation of Harry W. Bolens against James A. Frear, Secretary of State of the State of Wisconsin, Andrew H. Dahl, State Treasurer of the State of Wisconsin, the Tax Commission of the State of Wisconsin, Nils P. Haugen, Thomas E. Lyons, and Thomas S. Adams, members of said Tax Commission, by writ of error to the Supreme Court of Wisconsin, to review a judgment of that court rendered on the 9th day of January 1912, in an action entitled as above, and,

WHEREAS said action was attempted to be instituted and said writ of error procured to be issued by the said Harry W. Bolens, a private person, without authority from the State of Wisconsin or any of its authorized officers, boards or bodies, and,

WHEREAS, in my opinion, the rights, interests and property of the state are liable to be injuriously affected, and, deeming it not to be for the best interests of the state that it should be made party plaintiff in such action, in said Supreme Court of the United States, or that said action should proceed, now

THEREFORE, I, Francis E. McGovern, Governor of the State of Wisconsin, do hereby request that you appear in said Supreme Court of the United States, on behalf of the State of Wisconsin and move to dismiss said action and writ of error, and take such other steps therein as you may deem necessary for the protection of the rights and interests of the State of Wisconsin.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Executive Privy Seal, at the Capitol, in the City of Madison, this 13th day of February, A. D. 1913.

FRANCIS E. McGOVERN.
Governor of the State of Wisconsin.

By the Governor:
DUNCAN McGREGOR,
Private Secretary.

IN SUPREME COURT OF THE UNITED STATES.
STATE OF WISCONSIN EX REL H. W. BOLENS, Plaintiff in Error,
vs.
JAMES A. FREAR, et al., Defendants in Error.
Docket No. 447.

STATE OF WISCONSIN }
Milwaukee County. } ss.

RUSSELL JACKSON being duly sworn says that during and throughout the years 1911 and 1912, and until the month of March, 1913, he was the Deputy Attorney General of the State of Wisconsin. That Carpenter and Poss were originally employed by and appeared for the relator, H. W. Bolens, in the application to commence the action in the Supreme Court of Wisconsin, the judgment in which is sought to be reviewed upon this writ of error. That never did they at any

time receive any direction or authority to represent the said State or to take any steps on its behalf in said action. That since the rendition of said judgment no direction, consent or authority has been given to said attorneys Carpenter and Poss, nor to the said Bolens to make application on behalf of the State of Wisconsin for writ of error to review said judgment, nor to take any steps or do any act with reference thereto on behalf of said State. That affiant as such officer was specially charged with care of this case so far as the interests of said State were involved and had personal knowledge of the facts hereinabove stated.

RUSSELL JACKSON.

Subscribed and sworn to before me this 31st day of October, 1913.

FLORA B. HOLT.
Notary Public, Wisconsin.

STATEMENT AND ARGUMENT

The foregoing application to the Court for dismissal of the writ of error is, in our view, quite unnecessary. The State of Wisconsin as plaintiff in error, might, by agreement with the defendant in error, summarily procure such dismissal by the Clerk under Rule 28. However, inasmuch as the record discloses the presence of a *tertium quid* yclept a relator, who has evinced in this and some antecedent proceedings, somewhat exalted ideas of his right to use the name and decide the policy of the State of Wisconsin, we have thought it more seemly to submit our views to the court in the first instance with opportunity for that relator to be heard, although we can find nothing in the record to support any such right in him.

The suit, error in which is sought to be reviewed, was peculiar. Probably such as could exist nowhere except in the Supreme Court of Wisconsin. See discussion of the general subject in *St. ex rel Taylor vs. Lord*, 31 L. R. A. 473. A terse and accurate statement of the proceedings prefaces the argument presented upon defendant's motion for dismissal which accompanies this motion and to it we invite attention.

One Bolens alleging himself to be a citizen and tax-payer made application to the Supreme Court of Wisconsin for leave to bring an original suit in that Court to enjoin all acts of state officers in execution of a newly passed income tax law (Ch. 658 Laws of 1911) Printed transcript p. 20 et seq.) which among other things provided for the organization of an assessing and taxing department consisting of an Income Tax assessor and corps of District assessors and local boards of review, all in addition to the taxing machinery previously existing, to be paid out of the State treasury; and especially and preponderantly to enjoin all acts tending to the payment of any money in pursuance of said law for the reason that it infringed multitudinous provisions of both the federal and the state constitutions. The suit was

clearly framed as a tax-payers' action and was claimed to be such i
Mr. Bolens' attorneys throughout, even up to their closing argume
filed after the case had been submitted to the Court. That kind
an action in the courts of original jurisdiction and against municip
and county officers is familiar to the jurisprudence of Wisconsin an
is based upon the right of the plaintiff (or of a class) to protect
private interest in money in a public treasury to which he, as a tax
payer, has contributed. See opinion this case 148 Wis. 456, 50
(trans. pp. 50 to 72). The attempt to invoke the original jurisdictio
of the Supreme Court was based on the ground that, while Bolens
sued in his private right, the state at large was so vitally affected tha
such jurisdiction ought to be exercised under the power granted by the
constitution as construed by the decisions all of which will be found
set forth in the opinion in this case.

The complaint was allowed to be filed provisionally and process to
issue, with reservation of the question of the Supreme Court's origi-
nal jurisdiction, until the hearing on the merits, which were raised by
a general demurrer.

The Court decided that a tax-payer's action could not be main-
tained to prevent misapplication of funds in the State treasury; that
no private right in such funds exists in the tax-payer or his class
and accordingly dismissed several associated cases which had been
commenced in Circuit Court and were heard, on appeal, with this one,
and in effect refused to entertain this one so far as any private right
of Bolens was attempted to be vindicated therein. See opinion, trans.
pp. 70 and 71.

The questions so decided, of course, presented nothing of a federal
nature. They were questions of mere state procedure and polity.

The Court, however, found disclosed, incidentally, by the complaint
a condition in which the State itself might, and, in the opinion of the
Court, ought to invoke investigation by its supreme court of the con-
stitutional sufficiency of the income tax enactment to authorize the
creation of this new department, the payment out of the necessary
expenses and the forbearance of the former methods of raising reve-
nue supplanted by the income tax, which former, of course, should be
enforced if the new law were unconstitutional. The Court, therefore,
under a power deduced from the constitution to decide when the State
ought to make use of any of its prerogative writs, retained this action
as one *by the State* in which the relator had no interest and to which
his relation ceased when he had brought the facts before the Court
and disclosed the absence of any private right or interest in himself
Transcript pp. 70 and 71.

The decision of the Court upon the merits was to the effect that no
case was made to warrant injunction against steps by the Executive
department toward carrying this law into effect and that the com-
plaint be dismissed. It was said, "As a whole we regard the law
constitutional. If there be provisions which will not stand the test

they are not provisions of such a nature that they must be considered as the inducement to or compensation for the balance of the law. They may drop out and leave the law intact in its fundamental and essential features." (Trans. p. 81.) Again, it was pointed out that, of course, the right of any individual injuriously affected by any phase of the law, to resist it, if indeed any should choose to do so, could well be preserved to him when his rights should be invaded without entirely thwarting the declared legislative policy of substituting an income tax as a means of revenue for certain pre-existing and discredited schemes of taxation (Trans. p. 81). The Court did express its opinion adversely as to two of the alleged conflicts between the law and the federal constitution, but by no means declared that such opinion is the basis of, or essential to, its conclusion and judgment not to issue the paralyzing injunction prayed. Those phases of the law are first, the asserted double taxation of real estate, by the usual tax ad valorem and the tax upon rentals as income (Trans. p. 75); and secondly the progressiveness of the income tax rate from one per cent on $1,000 of income to six per cent on the thirteenth thousand and all excess (Trans. p. 74.) Obviously both the inclusion of realty rentals and the levy of the progressive rates might be eliminated in administration of the law and yet the rest of it be enforced without raising either of those federal questions.

Following the decision of the State Court and intermediate the issue of the writ of error, as this court must presume and as the fact is, changes in the situation occurred which bear very directly upon the advisability of the State government seeking judicial aid or submitting to judicial guidance or restraint. The new department of income tax administrators was created, executive constructions of the law were promulgated which effectually laid many of the ghosts of most horrid mien conjured up by relator's briefs and arguments; easy methods of amendment of many defects in the law became apparent as also probability of general loyalty, rather than resistance, to the general plan on the part of the tax-payers. Besides which a general election was held at which the will of the electors in favor of persistence in and retention, with detailed correction, of the income tax, was declared. One at least of the discriminations assailed has been eliminated by amendment. Thus the then question of advisibility of renewing or persisting in litigation was very different from that presented in August 1911, when suit was commenced. No State officer made or joined in the application for the writ of error. It was made by relator's attorneys.

Among the most absolute rights inhering in a sovereign government is that of deciding whether or not it will subject itself to the jurisdiction of any Court. The question of such submission is one of policy, political in its character and involving many considerations of embarrassment of the government's functions, such as exposing itself, under the doctrine of *res adjudicata* to decisions of important questions

about which the legislative mind might differ; compelling conduct of executive officers adversely to the policy approved by the legislature and in many ways substituting policies in accord with the opinions of the Court in place of those most ardently favored by the people of the commonwealth and by those to whom they had delegated authority to choose. *See Hagood v. Southern*, 117 U. S. 52, 68. *Cunningham v. Ry.*, 109 U. S. 446, 452. To illustrate, in case of insurrection arises the question whether suppression can be best accomplished by armed force or by mandate of a Court. That presents a question of policy, clouded perhaps by many conflicting reasons, and the political departments should not be prevented from resolving it according to their best judgment, as they did in fact in the Debs case, 158 U. S. 564, 582. The president might in that instance have decided instead that public welfare demanded prompt exercise of force and that delay for judicial deliberation might be fatal; in which case it would have been his duty as well as right to so act without restraint by any Court.

The general proposition that without its consent given either by the legislative branch, or perhaps by the executive, no sovereign government can be made a party to an action in Court, has been so uniformly declared that citation of any but illustrative cases would but burden the argument.

Louisiana v. Jumel, 107 U. S. 711.
Christian v. Ry., 133 id. 233, 243.
Hans v. Louisiana, 134 id. 1.
Stanley v. Schwalby, 162 id. 255.
Louisiana v. Texas, 176 id. 1.
Hopkins v. Clemson College, 221 id. 636.
Porto Rico v. Castillo, 33 S. C. Rep. 352.
C. M. & St. P. Ry. v. St., 53 Wis. 509.
Houston v. St., 98 Wis. 481.
St. ex rel Attorney General v. Frost, 113 Wis. 659.
Troy Ry. v. Commonwealth, 127 Mass. 43.

True in most of the cases cited there was an attempt to make the sovereign a defendant, but the principle is, beyond question, the same when it is made plaintiff. The abatement of the discretionary power of the political branches of the government is the same. There is the same liability to counter-claim and *res adjudicata*, the same substitution of the opinion of the Court for that of the legislative or the executive, both as to the duty and as to the policy of the detail acts of the State officers. Therefore, the legislative authority of any person instituting any action in behalf of a State is always a necessary question.

State v. Duff, 83 Wis. 291.
State v. Pederson, 135 Wis. 31.
People v. Navarre, 22 Mich. 1.
Benallack v. People, 31 Mich. 200.

Babcock v. Hanselman, 56 id. 27.
Succession of D'Aquin, 9 La. Ann. 400.
N. O. Ry. v. New Orleans, 34 id. 429.
Ex parte Dunn, 8 Rich. (So. Car.) 207, 230.
Day Co. v. St., 68 Texas 526.
Henry v. St., 87 Miss. 1.
U. S. v. Throckmorton, 98 U. S. 61.
U. S. v. San Jacinto Co., 125 U. S. 273, 280, 284.

Again it is held uniformly that the officer attempting to appeal must have due legislative delegation, express or necessarily implied, to decide upon this question of State policy or his attempt is ineffectual.

State v. Duff, 83 Wis. 291.
Babcock v. Hanselman, 56 Mich. 27.

By a succession of decisions in Wisconsin most admirably analyzed and exhaustively set forth by the illuminating opinion of the Chief Justice in the case under review, it is established that by our constitution is conferred upon the Supreme Court so much of the political power of this sovereign State as is involved in deciding the question of policy whether its sovereignty will be best promoted by certain kinds of suits *in that tribunal* against those who threaten it and therefore that the order of that Court allowing such a suit to be commenced is a consent by the State. That opinion so fully covers the ground that citation of other decisions here is needless. That measure of political power, namely to decide when, in protection of its sovereignty, the State should invoke the aid of its own Supreme Court, and as a consequence, submit the political branches of government to its judicial control, however, extends to suits only before that specially trusted tribunal. Nowhere in the constitution nor in the decisions by which is declared this power of authorizing suits in the name of the State is there any suggestion that the Supreme Court may declare the consent of the State to be made a litigant in any other forum—in any other Court either of Wisconsin or any other jurisdiction, which is an important difference.

Smith v. Reeves, 178 U. S. 436, 441.

Hence the formal ex-parte allowance of the writ of error by the Chief Justice can not have any effect as constituting any consent by the State to engage as a litigant in this new suit in a Federal forum. It, of course, was not intended as an exercise of the State's discretion, but merely as the usual formality prescribed by federal statute and permitted to the State judge in lieu of one of the justices of this court.

The rule that a State is subject to technically a new action by writ of error on the application of a defeated adversary, *Cohen v. Vir-*

ginia, 6 Wheat. 264, 410; *Hans v. Louisiana*, 134 U. S. 1, has no rele
ancy to the question whether anyone but the State government m
decide whether it will proceed by writ of error to have reviewed
judgment against it. In deciding such question, as in originally i
stituting a suit, many considerations of policy arise, as they woul
with an individual. Such for instance as whether the expense, th
inconvenience, the confusion and delay and restraint it governmen
tal administration may not be worse than an erroneous declaration o
abstract rules of law.

In the instant case as already suggested many new considerations were presented to the department of the State government charged with deciding questions of governmental policy at the time of the application for this writ. The attitude of the citizens through the many months of administration of the law as indicative of a general compliance therewith so that the individual resistances thereto were likely to be negligible at least to the question of revenue. The probability of amendment at the immediately imminent session of the legislature and consequent removal of many questions. The uncertainty whether any of the federal questions really burdening the law or the general scheme could be authoritatively settled except in an action involving as a party some individual having a direct grievance. All these and many others that might be suggested presented questions resolvable one way or the other, but in the discretion of responsible State officers vested with discretion. In the exercise of their best judgment, both the Attorney General and the Governor have decided against persistence in or renewal of this litigation. (See the Governor's proclamation above printed). No one but Bolens or his attorney has attempted to commit the State to a different policy. The State has not vested in them any of its political discretion.

We most earnestly protest that the States's sovereignty is impaired in a most important respect if its administration may be haled before a court for regulation or restraint by any casual critic of its policy. Such practice, if carried to ultimate results, means paralysis, perhaps in cases where the promptness which inheres only in the executive is essential to continued existence.

The present government of Wisconsin feels that it would be derelict in its duty if it did not resist the instant attempt to impair its sovereignty and appeals to this court to thwart such attempt.

Further, this effort of the State by its authorized officers to control the management of its own litigation and to terminate it, in no wise injures the so-called relator, Mr. Bolens. It nowhere appears in the complaint that he has any rights which might suffer by the judgment of the Supreme Court of Wisconsin or by a dismissal of the writ of error. Except that he is "a tax-payer" he alleges nothing to differentiate him from any other citizen. His asserted interest in the State funds threatened to be expended, even if it had existed, had ceased before the writ issued because the expenditures had been made. He

alleges no personal interest in any of the federal questions he seeks to have reviewed, or injury from the income tax law. He does not allege that it will impose any tax on him; not that he will suffer from the progressive features of it—if subject to any income tax, it may be only to the lowest rate; not that the so-called double taxation of real estate injures him—he may be landless; not that he is interested in the taxation of interstate commerce or its profits—he may be as local as a well-digger. In brief there is no hint in the record that refusal or dismissal of the writ could in any way prejudice him. Nor is he in any wise aggrieved or injured in any of his legal rights by the judgment sought to be reviewed which is essential to his recognition in this court.

Lampasas v. Bell, 180 U. S. 276.
Clark v. Kansas City, 176 U. S. 114.
Tyler v. Judges, 179 id. 405.

Again it must not be overlooked that the state court passing upon mere questions of jurisdiction and practice under State law refused to entertain the cause with Bolens as a party. Its rulings on the subject entirely eliminated him. His name should have disappeared, even as relator, from all subsequent proceedings. It only lingered through clerical anxiety for identification of the cause. Being not a party he, of course, could not maintain writ of error.

Ex parte Cutting, 94 U. S. 14.
Ex parte Cockcroft, 104 id. 578.
So. Carolina v. Wesh'g, 155 id. 542.

WALTER C. OWEN,
Attorney General State of Wisconsin.

J. E. DODGE,
Of Counsel.

APPENDIX.

Several amendments of the assailed income tax law of 1911 adopted in 1913, as is judicially known, but for convenience of court we refer to such as apply to relator's criticisms as we u stand them.

Sec. 1087m—2, subsec. 1, subd. d, assailed for inequality amended by Ch. 720, Sec. 2, Laws 1913.

Sec. 1087m—2, subsec. 3, attacked on federal grounds, was amen by Ch. 720, Sec. 3, Laws 1913.

Sec. 1087m—3, subdiv. a, b and c, amended by Ch. 720, Sec Laws 1913.

Sec. 1087m—4, subdiv. a and c, amended by Ch. 720, Sec. 5, La 1913.

Sec. 1087m—4, new subd. k, allowing deduction of dividends National banks, enacted by Ch. 615, Sec. 2.

Sec. 1087m—5, subs. 1, subd. c, amended by Ch. 720, Sec. 6, La 1913.

Sec. 1087m—5, subs. 2, amended to wholly exempt income of N tional banks by Ch. 615, Sec. 3 Laws 1913.

Sec. 1087m—6, subs. 2, repealed and a different rule of progressi of tax on corporations adopted by Ch. 720, Secs. 7 and 8, Laws of 191

Sec. 1087m—26, amended by Ch. 615, Sec. 3, Laws of 1913.

STATE OF WISCONSIN ON THE RELATION OF BOLENS *v.* FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 447. Motion to dismiss submitted December 15, 1913.—Decided January 5, 1914.

In this case this court follows the construction given by the highest court of the State to the provisions of the state constitution in regard to its jurisdiction of cases in which the State is a party or which are brought by the consent of the State on the relation of an individual.

Where the relator has no authority to sue except by consent of the State, and he is a mere agent for calling judicial authority into activity for protection of general public rights, and not for redress of individual wrongs, the State is the real party plaintiff and the relator has no power without its consent to prosecute error to this court.

Where, in such a case, the State does not consent that the relator prosecute error the writ will be dismissed; the case is not within Rev. Stat., § 709 (Judicial Code, § 237), and this court has not jurisdiction.

The fact that this court has authority under § 237, Judicial Code, to decide a legal question in a case where jurisdiction exists, does not give it power to decide that question in a case where jurisdiction does not exist.

Where jurisdiction does not exist this court will not pass upon the questions involved so that in future cases involving those questions the state court may be guided by the views expressed by this court thereon.

Writ of error to review 148 Wisconsin, 456, dismissed.

THE facts, which involve the jurisdiction of this court of a writ of error to review the judgment of a state court against a relator who is not the agent of the State, and who has without authority of the State sued out the writ of error, are stated in the opinion.

Mr. W. C. Owen, Attorney General of the State of Wisconsin, *Mr. George G. Greene* and *Mr. J. E. Dodge* for defendants in error in support of the motions.

Mr. Paul D. Carpenter for plaintiff in error in opposition to the motions.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Attorney General of the State of Wisconsin by direction of the Governor of the State moves to dismiss on the ground that the State is the real party in interest, because Bolens, the relator, personally, was in the court below the mere agent of the State, devoid of all authority to prosecute this writ of error and thereby to implead the State in this court without its consent. Indeed, the motion to dismiss in a strict sense is a motion to quash the writ of error on the ground that no writ was ever sued out, and that in effect there is no judgment below to which the writ could be directed since the State, which was the party plaintiff and the officers of the State who were the defendants, both acquiesced in and have executed the judgment.

The decree to which the writ of error is directed was rendered on a demurrer to the petition filed in the Supreme Court of Wisconsin by Bolens, as relator, asking the court as a matter of original cognizance to enjoin the putting in force of a state law creating a new system of state taxation described as "progressive income taxation." 148 Wisconsin, 456. We accept a statement contained in the argument of the plaintiff in error concerning the nature of the original jurisdiction of the court below:

"The Constitution of the State of Wisconsin confers original jurisdiction upon the Supreme Court of the State to issue writs of injunction and other original and remedial writs and to hear and determine the same. (Art. VII,

Sec. 3.) This clause gives full jurisdiction to the state Supreme Court over any question *quod ad statum reipublicæ partinet*, affecting the 'sovereignty of the State, its franchises or prerogatives or the liberties of its people.' Such action is to be brought originally in the state Supreme Court and may be instituted by the Attorney General, acting on his own initiative or acting on the petition of a citizen; or if he refuses to act on the petition of a citizen, then the citizen may on notice apply to the Supreme Court for permission to bring the action for the State in the name of the Attorney General, and the Court may refuse or grant such permission."

Further, we adopt a statement in the argument for the plaintiff in error as to the grievances which it was deemed required judicial redress and the steps taken which were exacted by the state statute as prerequisite to obtain an exertion by the court of its original jurisdiction:

"Harry W. Bolens presented his petition to the then Attorney General of Wisconsin, setting up that the Wisconsin Income Tax Law, Chapter 658 of the Laws of Wisconsin for 1911, is wholly null, void and of none effect for that it violates numerous sections of both state and Federal Constitutions, most of these objections being set out in detail, followed by an omnibus allegation; and praying that for the wrongs complained of and for the protection of himself and all others similarly situated, and for the protection of all the taxpayers of the State against the threatened invasion of their rights and liberties, and forasmuch as all said persons are remediless in the premises without the interposition of the state Supreme Court, that the Attorney General move the Court for leave to bring the action designed 'so as fully to protect and secure the said rights and privileges guaranteed to the people of this State by the Constitution of the United States and the amendments thereto and the Constitution of the State of Wisconsin and the amendments thereto.'"

The Attorney General refusing to comply with the request, the Supreme Court, on motion of the relator, ordered the petition to be filed without prejudice to thereafter considering whether there was jurisdiction to entertain it. Subsequently the court overruled a demurrer challenging its original jurisdiction and moreover held on a demurrer addressed to the merits that the petition stated no ground for the relief which was prayed. The court in so doing defined the nature of the power possessed by it as a matter of original jurisdiction to hear and determine the case made by the petition.

It said, 148 Wisconsin, p. 500:

"This transcendent jurisdiction is a jurisdiction reserved for the use of the State itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people. The State uses it to punish or prevent wrongs to itself or to the whole people. The State is always the plaintiff, and the only plaintiff, whether the action be brought by the Attorney General, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit. He is a mere incident. He brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the State. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the State's action proceeds to vindicate the public right." Contrasting the authority thus possessed by virtue of its original jurisdiction with the ordinary processes for the redress of private wrongs the court said: "These propositions, if correct, and we believe they are, demonstrate very clearly that there can be no such thing as a tax payer's action (as that action is known in the circuit courts) brought in the Supreme Court within the original jurisdiction."

Referring to such a tax-payer's suit, the court observed (p. 501):

"The tax payer himself is the actual party to the litigation, and represents not the whole public, nor the State, nor even all the inhabitants of his municipality, but a comparatively limited class, namely, the citizens who pay taxes. In short, he sues for a class. No such thing is known in the exercise of the original jurisdiction of this court. In actions brought within that jurisdiction the State is the plaintiff and sues to vindicate the rights of the whole people."

Applying these doctrines, it was said (p. 501): "The *Bolens Case* (this case) cannot therefore be held to come within the original jurisdiction of this court, if it be a mere taxpayer's action."

After further pointing out the distinction between the right of an individual to sue in a trial court to enforce an individual right or redress a wrong and if aggrieved to prosecute error or appeal and the difference between the exertion on such error or appeal of authority to review and the extraordinary power exerted when original jurisdiction was invoked, the court came to consider the merits of the petition. In doing so it declared that because of the public nature of the controversy, it would confine attention solely to those matters which were addressed to the invalidity of the statute as a whole. In passing upon questions of that character propositions which asserted the statute to be repugnant to both the United States and state constitutions, were analyzed and held to be without merit. The petition was dismissed.

From this statement it is apparent that the motion of the State to dismiss is well-founded for the following reasons: (*a*) Because accepting the interpretation affixed by the court below to the state constitution and the resulting ruling as to the scope of its own original jurisdiction, it follows that the State was the only real plaintiff below,

since the relator had no authority to sue but by the consent of the State, and as its mere agent for the purpose of calling into activity judicial authority, not for the redress of individual wrong, but for the protection of general public rights; (*b*) because the suit, having been brought by the consent of the State in its behalf, the relator had no power, without the consent of the State, to prosecute error, and thus to implead the State without its consent; (*c*) because as the relator did not resort to the methods provided by law for the enforcement of his individual rights, if any, but elected solely to resort, by the consent of the State, to a jurisdiction given only for the redress of general public wrongs, he may not, by means of a writ of error, directed from this court, transform the nature of the proceedings and secure at the hands of this court, under the guise of an appellate proceeding, the exertion of authority to originally determine alleged grievances which were not passed upon by the court below and are not within the scope of Rev. Stat., § 709 (Judicial Code, § 237). The argument that if, asserting his individual grievances, the case had been brought in a trial court and had been carried to the Supreme Court of the State from an adverse decision upon a Federal question the judgment or decree of the Supreme Court would be here reviewable, hence the decision in this case, to save circuity of action, should be now reviewable, amounts but to saying that because there is authority to decide a legal question in a case where there is jurisdiction, there must also be power to pass upon the same question when it arises in a case over which there is no jurisdiction. Under the ruling below no individual right of the relator was denied and because it may be inferred that if in the future a case asserting individual rights in due course of procedure comes to the court below, that court will be controlled or persuaded by the opinions expressed in this case, furnishes no ground for the exertion by this court in the

present case of a jurisdiction which it does not possess. Indeed, whether the case be considered in the light of the absence of any assertion of individual right or grievance on behalf of the relator or be looked at from the point of view that the suit was one under the state law which could only be brought by the permission of the State and for the protection of its governmental authority, the State being therefore the real party plaintiff, or if it be tested by the want of authority on the part of the relator by means of a writ of error to implead the State under the circumstances disclosed without its consent in this court, the want of jurisdiction is so conclusively shown by previous decisions as to leave no room for controversy (*Smith* v. *Reeves*, 178 U. S. 436).

Dismissed for want of jurisdiction.

WYANDOTTE COUNTY GAS COMPANY *v.* STATE